No. _____

IN THE

Supreme Court of the United States

EDWARD VARGAS,

Petitioner,

v.

CRAIG KOENIG, WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

ELIZABETH RICHARDSON-ROYER*
Attorney-at-Law
3739 Balboa St., Ste. 1095
San Francisco, CA 94121
(510) 679-1105
beth@richardsonroyer.com

Attorney for Petitioner
**Counsel of Record*

Appointed under the Criminal Justice Act, 18 U.S.C. § 3006A(a)(2)(B)

QUESTION PRESENTED

Whether the Ninth Circuit misapplied this Court's precedents in ruling that Petitioner was not denied fair notice of the charges against him despite the jury convicting him of conspiring to murder two individuals not named in the indictment.

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PETITION FOR A WRIT OF CERTIORARI

Edward M. Vargas, Sr. petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

JUDGMENT BELOW

The judgment below is unreported and is included in Petitioner's Appendix ("App.") at 1-4. It is also available at 829 Fed. Appx. 796.

JURISDICTION

Judgment was entered below on November 19, 2020. Pursuant to this Court's Order dated March 19, 2020 regarding the COVID-19 public health emergency, "the deadline to file any petition for a writ of certiorari . . . is extended to 150 days from the date of the lower court judgment." Accordingly, the petition is due April 19, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amend. VI

"In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation."

U.S. Constitution, Amend. XIV

"No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

Title 28 U.S.C. § 2254(a)

"The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in

custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

Title 28 U.S.C. § 2254(d)

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -

(1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

STATEMENT OF THE CASE

On May 27, 1992, a multi-count, multi-defendant indictment was filed in the Santa Clara County Superior Court against a number of members of the Nuestra Familia ("NF") prison gang and its feeder organization, Northern Structure ("NS"). The operative third amended indictment charged 21 codefendants, including Petitioner Edward Vargas, with conspiring to commit murder as well as various other offenses. (App. 115-50.) The indictment named 39 unindicted co-conspirators and listed 96 overt acts. (App. 116-29.) Among the overt acts for the conspiracy charge (Count One) were five murders and three attempted murders. (App. 119-27.) Most did not involve Petitioner.

With respect to murder, the indictment alleged that Petitioner gave the "green light," or authorization, for the murder of a man named Elias Rosas. (App. 159.) The prosecution presented evidence at trial to support this allegation. (*See* ER 233-55, 366-577, 578-669.)[1]

The names Alfonso Urango and James Esparza, however, did not appear as victims anywhere in the indictment. (App. 115-50.)[2] Nor had there been any grand jury testimony concerning plans or attempts to kill either of these individuals. (*See* App. 157.)

At trial, cooperating witness Jerry Salazar nonetheless testified that he and Petitioner sent two other men to Urango's door, armed, to kill him. (ER 405-12.) When Urango's girlfriend opened the door instead, the plan was abandoned. (ER 411-12; *see also* ER 276.)

Salazar also claimed that Petitioner ordered him to kill Esparza, whose name appeared on an NF hit list. (ER 415.) Salazar claimed that the reason he did not follow the orders was because he believed Petitioner had a personal issue with Esparza over a girl. (ER 415-16, 565.)

During the jury instruction conference after the close of evidence, defense counsel objected to any reference to a conspiracy to murder Urango or Esparza,

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[1] "ER" stands for the "Excerpts of Record" that were submitted alongside the opening brief before the Ninth Circuit.

[2] Both individuals were named as uncharged co-conspirators. (App. 116-18.) The indictment also alleged that Urango played a role in transporting firearms for the gang in April 1991. (App. 121.)

arguing that those events were neither the subject of any grand jury testimony nor alleged as overt acts in the conspiracy count. (App. 157.) Counsel argued,

> [T]he only evidence we heard was during the course of the trial from Jerry Salazar and perhaps one other witness. Mr. Vargas was not in the position where he could prepare a defense with reference to those allegations since they didn't occur until the trial was well in progress. So any reference to those specific charges as object crimes of the conspiracy are certainly unfair to Mr. Vargas.

(*Id.*)

Despite Petitioner's complaints, the prosecution specifically argued in closing that the jury could convict on Count One if it found a conspiracy to murder Urango or Esparza:

> Curious about who might be the subjects of the target crime of murder. Louie Chavez was one. . . . [¶] Ronnie Shelton later tried to implement that same subject crime. There were others. There was George Bouldt, remember Ponche. *There was Alfonso Urango.* There was Beto Jasso . . . . *There's Jocko Esparza.* That was the man who Vargas didn't like because he was apparently having a sexual relationship with Vargas' wife Tammy.

(App. 155 (emphasis added).)

The jury convicted Petitioner on Count One without specifying the objects of the various conspiracies. But at sentencing, the trial court explained that it was imposing consecutive sentences because of the evidence of murder conspiracies *other than* the one involving Rosas, which was charged in the indictment. (App. 152-53.) And the trial court specifically mentioned Urango and Esparza as victims. (*Id.*) The California Court of Appeal subsequently affirmed imposition of consecutive

sentences on the same basis—i.e., because there was evidence that Petitioner conspired to murder individuals other than Rosas. (App. 109.)

The California Court of Appeal rejected Petitioner's claims that he was denied due process and fair notice of the charges against him, reasoning that because the object of the murder conspiracy was not an element of the offense. (App. 108-09.)

Below, the Ninth Circuit rejected Petitioner's claim on the basis that this Court had not "clearly establish[ed] the legal proposition needed to grant . . . habeas relief." (App. 3-4.)

REASONS FOR GRANTING THE WRIT

A. The Ninth Circuit's Decision Conflicts with Decisions of this Court.

The Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation." U.S. Const. amend. VI. Similarly, as a matter of due process, it is "clearly established . . . that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts." *Cole v. Arkansas*, 333 U.S. 196, 201 (1948); *see also In re Oliver*, 333 U.S. 257, 273 (1948) ("A person's right to reasonable notice of a charge against him . . . [is] basic in our system of jurisprudence . . . .").

This Court has clearly established that a defendant must be given sufficient notice of the charges against him that he will be able to defend against them. *See*

Russell v. United States, 369 U.S. 749 (1962); *Cole v. Arkansas*, 333 U.S. 196, 201 (1948); *In re Oliver*, 333 U.S. 257, 273 (1948). The Ninth Circuit was wrong to conclude otherwise. In particular, that court's decision cannot be reconciled with *Russell*. In that case, the defendants were charged under 2 U.S.C. § 192 with refusing to answer questions when summoned before a congressional subcommittee. The indictment, however, failed to identify the specific subjects under inquiry when the refusal occurred, in violation of the Sixth Amendment. This Court explained, "The vice which inheres in the failure of an indictment under 2 U.S.C. § 192 to identify the subject under inquiry is thus the violation of the basic principle 'that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him." *Id.* at 767.

Nothing in *Lopez v. Smith*, 574 U.S. 1 (2014), justifies the Ninth Circuit's disregard of the well-establish principle requiring fair notice of criminal charges. In *Lopez*, this Court merely concluded that the "general proposition that a defendant must have adequate notice of the charges against him" did not clearly establish a rule that a defendant is entitled to notice of the *legal theory of liability*—e.g., derivative liability, as opposed to direct. *See id.* at 4. Petitioner's claim was not that he was denied notice of the theory of liability—that theory was conspiracy. His claim, instead, was that he was denied fair notice of the nature of the criminal activity with which he was charged. This Court's authorities and the Constitution require such notice. This Court should grant the petition for writ of certiorari to make clear that its decisions have clearly established that a criminal defendant

must be given fair notice of the nature of the activity underlying the charges he faces. *See Valentine v. Konteh*, 395 F.3d 626, 631 (6th Cir. 2005) (holding that state court unreasonably applied Russell in rejecting defendant's due process claim that indictment failed to provide him notice about which specific instances of criminal activity against which he would be required to defend).

B. This Court Presents an Appropriate Vehicle for this Court to Reaffirm that the Constitution Requires that a Criminal Defendant Be Provided Fair Notice of the Basis for the Charges Against Him.

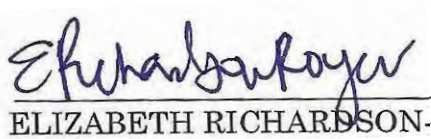
This case provides an appropriate vehicle for this Court to clarify that its previous decisions clearly establish the rule that a criminal defendant must be given fair notice of the charges against him. The issue was squarely presented below, certified for appeal, and decided on the merits. (*See* App. 3-4.)

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DATED: April 19, 2021

By: 

ELIZABETH RICHARDSON-ROYER
Attorney-at-Law

Attorney for Petitioner
**Counsel of Record*

Appendix

NOT FOR PUBLICATION

FILED

NOV 19 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDDIE M. VARGAS, Sr., Petitioner-Appellant, v. CRAIG KOENIG, Acting Warden, Respondent-Appellee.	No. 18-15708 D.C. No. 5:03-cv-02930-EJD MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Edward J. Davila, District Judge, Presiding

Submitted November 16, 2020**
San Francisco, California

Before: NGUYEN, HURWITZ, and BRESS, Circuit Judges.

Eddie M. Vargas, Sr. was convicted in California of first-degree murder, conspiracy, and possession of a concealable firearm by a convicted felon in 1997. His 28 U.S.C. § 2254 petition asserts ineffective assistance because his trial counsel opposed severing Vargas's trial from that of his codefendants. Vargas also claims

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

he was denied due process when the prosecution introduced evidence about two attempted murders not listed in the indictment as overt acts of the conspiracy. The district court denied the petition, and this Court granted a certificate of appealability. We affirm.

1. Because this case is governed by The Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. 104–132, 110 Stat. 1214 (1996), our review of Vargas's ineffective assistance claim is "doubly deferential." *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). We ask only whether the state court "could have reasonably concluded" that Vargas's counsel was not constitutionally deficient. *See Cullen v. Pinholster*, 563 U.S. 170, 194 (2011) (citing *Strickland v. Washington*, 466 U.S. 668, 691 (1984)). *Strickland* imposes a "strong presumption that counsel's performance was within the wide range of reasonable professional assistance [that] might be considered sound trial strategy." *Carrera v. Ayers*, 670 F.3d 938, 943 (9th Cir. 2010) (cleaned up).

2. The state court reasonably concluded that counsel's opposition to severance did not fall below an "objective standard of reasonableness." *Strickland*, 466 U.S. at 688. Vargas claims that counsel was ineffective because, unlike him, his codefendants faced possible death sentences, and the Supreme Court has purportedly placed the defense bar on notice that death qualification of a jury harms a client not facing the death penalty. However, the cases on which Vargas relies do not establish

that principle. In *Lockhart v. McCree*, 476 U.S. 162 (1986), the Court simply held that death-qualifying a jury during the guilt phase of a capital trial does not violate the Sixth Amendment. And, *Buchanan v. Kentucky*, 483 U.S. 402 (1987), held that use of a death-qualified jury did *not* deprive a homicide defendant of his right to an impartial jury when only his codefendant faced the death penalty.

Counsel opposed severance because he believed Vargas would be "viewed in a better light by the jury" compared to his more culpable codefendants who faced the death penalty. Vargas, after hearing counsel's reasoning, consented to that decision. This "strategic choice[ ] made after thorough investigation of law and facts relevant to plausible options [is] virtually unchallengeable." *Strickland*, 466 U.S. at 690.[1]

3. The district court also did not err in finding that Vargas was not deprived of due process when the prosecution presented evidence of the attempted murders of two people not named in the indictment as overt acts in furtherance of the conspiracy. Under California law, identifying the intended victim of a conspiracy to commit murder is proof of the "means" by which the conspiracy was to be achieved, not an "element" of the crime. *People v. Vargas*, 91 Cal. App. 4th 506, 563 (2001). AEDPA permits relief only when the Supreme Court has established a "specific

[1] Because Vargas's *Strickland* claim fails at the first step, we do not address *Strickland*'s "prejudice" requirement. *See Strickland*, 466 U.S. at 687.

rule" that "clearly establish[es] the legal proposition needed to grant . . . habeas relief." *Lopez v. Smith*, 574 U.S. 1, 6 (2014); 28 U.S.C. § 2254(d)(1). Vargas relies on *Cole v. Arkansas*, 333 U.S. 196 (1948), and *In re Oliver*, 333 U.S. 257 (1948). But, those cases "stand for nothing more than the general proposition that a defendant must have adequate notice of the charges against him." *Lopez*, 574 U.S. at 5–6.

AFFIRMED.

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

EDDIE M. VARGAS,

Petitioner,

v.

MIKE KNOWLES,

Respondent.

Case No. 5:03-cv-02930-EJD

JUDGMENT

The Petition for Writ of Habeas Corpus having been denied;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of Respondent.

IT IS SO ORDERED.

Dated: March 27, 2018

EDWARD J. DAVILA
United States District Judge

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

EDDIE M. VARGAS,

Plaintiff,

v.

MIKE KNOWLES,

Defendant.

Case No. 03-cv-02930-EJD

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS; DENYING CERTIFICATE OF APPEALABILITY

Re: Dkt. No. 1

Petitioner Eddie Vargas, represented by counsel, has filed a Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254 challenging a judgment of conviction from Santa Clara County Superior Court. For the reasons set forth below, the Petition for a Writ of Habeas Corpus is **DENIED**.

PROCEDURAL HISTORY

On July 14, 1997, a jury found Petitioner guilty of first degree murder and guilty of conspiracy to commit murder, assault with a deadly weapon, intimidation of witnesses, and possession of a concealable firearm by a convicted felon. Pet. at 9. The jury also found true the criminal street gang enhancement allegations and the prior felony convictions allegation. Pet. at 9. The state trial court sentenced Petitioner to a term of sixty years to life in state prison. Pet. at 9.

On August 6, 2001, the state appellate court affirmed the judgment. Resp. Ex. 1. On November 11, 2001, the California Supreme Court denied review. Resp. Ex. 2. On October 1,

2002, Petitioner filed a pro per petition for a writ of habeas corpus in the California Supreme Court. On April 30, 2003, the petition was denied. Resp. Ex. 3.

Petitioner filed the instant pro per petition for a writ of habeas corpus on June 24, 2003. Dkt. No. 1. In July 2005, the Court granted Petitioner's motion to appoint counsel. Dkt. Nos. 140, 142. The Court stayed the case in November 2008 to allow Petitioner to exhaust new claims in state habeas proceedings, then reopened the case at Petitioner's request in November 2011. Dkt. Nos. 189, 207. In November 2012, this Court granted Petitioner's request for a new attorney. Dkt. Nos. 226, 229. On April 3, 2015, Petitioner moved to amend his habeas petition to add the now-exhausted claims. Dkt. No. 240. On August 10, 2016, this Court denied Petitioner's motion to amend, finding that Petitioner's new claims were futile because they were procedurally barred or untimely. Dkt. No. 248. Therefore, the only claims before this Court are the claims presented in Petitioner's June 24, 2003 habeas petition.

DISCUSSION

A. Factual Background

The following facts are summarized from the opinion of the California Court of Appeal. Resp. Ex. 1. Petitioner was a member of the Nuestra Familia, a prison gang founded in September 1968 by inmates at the California State Prison San Quentin. The Nuestra Familia is considered "the most organized prison gang" in the California Department of Corrections and has influence both inside and outside of prison walls. Nuestra Familia membership is a lifetime commitment. According to the Nuestra Familia constitution, leaving the gang is punishable by death. When members defect from the Nuestra Familia, they are usually labeled traitors and killed.

One objective of the Nuestra Familia is "to build the organization on the outside, become self-supporting, work with those in alliance, any and all illegal ventures to build the funds that can be utilized to take care of members behind the walls or drug deals on the streets." To accomplish that objective, the Nuestra Familia has often targeted and killed anyone who opposes the gang, including defectors and rival gang members. In the instant case, the prosecution charged a number

of crimes that were committed by various members of the Nuestra Familia. Perpetrating such activities was in furtherance of the overriding purpose of the Nuestra Familia—namely, "to establish power through the use of crime, force, and fear, and to use that power to further strengthen and perpetuate itself by killing its enemies, raising money for the gang, and instilling obedience and discipline among its members."

Petitioner was charged with the murder of Elias Rosas and conspiracy to commit various crimes. Petitioner was allegedly involved in three incidents along with other Nuestra Familia affiliates such as Bobby Lopez, Jerry Salazar, Roland Saldivar, Louis Chavez, Albert Reveles, Tim Hernandez, and Ronnie Shelton. The Court provides the full summary from the California Court of Appeal's opinion:

> *D–9. Attempted Murder of Urango*
>
> Lopez authorized the murder of Alphonso "Huero" Urango because Urango "disrespected" the [Nuestra Familia] by not returning two guns, which belonged to the [Nuestra Familia]. Urango had said that he would trade the guns for a gram of PCP. Salazar testified that Urango's offer was "an automatic green light." Salazar talked with [Petitioner] about Urango's murder. In late June, or early July 1991, [Nuestra Familia] members, including Salazar, [Carlos] Mendoza, and [Petitioner] went to Urango's apartment to kill him. When they arrived, [Petitioner] told Saldivar and Mendoza to go to the apartment door, knock on it, and shoot Urango when he opened the door. When Saldivar and Mendoza knocked on the door, Urango's girlfriend, who was eight months pregnant, answered the door. Saldivar and Mendoza did not have the "guts" to kill Urango under the circumstances. No further attempts on Urango's life were made.
>
> *D–10. Murder of Rosas*
>
> [Elias] Rosas was a member of the [Northern Structure, a gang subservient to the Nuestra Familia].
>
> On December 31, 1983, two masked men broke into the home of Petra Gonzalez, who was the mother of Rosas' girlfriend. Rosas went to Gonzalez's defense.
>
> After the Gonzalez robbery, and while [Pablo] Pena was in prison with Chavez, Pena told Chavez that he (Pena) had robbed Rosas' home, taking drugs. Pena further told Chavez that he (Pena) believed that Rosas had "snitched on him." Chavez stated that even though Rosas was the victim, Rosas should not have told

> the police because Pena was a member of the [Nuestra Familia] at the time of the robbery, and Rosas was not.
>
> In late June 1991, . . . [Petitioner] discussed the Rosas matter with Salazar. [Petitioner] told Salazar that there was a "green light" on Rosas because Rosas had "snitched on Pablo Pena, Panther." However, [Petitioner] wanted to get some confirming "paperwork" first because if [Petitioner] was wrong and Rosas was killed, [Petitioner] would be killed. [Petitioner] told Salazar that the [Nuestra Familia] was not to hunt down Rosas to kill him, but that if [a Nuestra Familia] member should run across him, Rosas should be killed.
>
> On the night of Rosas' murder, Chavez received a telephone call from Albert Reveles and Tim Hernandez. Hernandez told Chavez that he was at a home where Rosas was "running his mouth" about Chavez, saying that Chavez was to be "hit" by the [Nuestra Familia]. Hernandez asked Chavez what should be done to Rosas, saying he wanted to kill Rosas. Chavez told Hernandez he did not have the authority to authorize the murder of Rosas because [Petitioner] was in charge.
>
> Chavez contacted Salazar, who set up a three-way telephone conference with [Petitioner]. In that telephone conference, [Petitioner] approved the murder of Rosas, saying: "Do what you got to do." [Petitioner] also told Chavez that he (Chavez) had the authority to call the hit.
>
> Hours later, Hernandez called Chavez to report that Rosas had been killed.
>
> Subsequently, [Petitioner] told Shelton at San Quentin that Rosas was behind "some drug deal that some drugs were involved and [Rosas] supposedly had snitched on [Pena] who's also an [Nuestra Familia] member." [Petitioner] admitted to Shelton that he [Petitioner] had called the Rosas "hit."
>
> *D–11. Order to Kill Esparza*
>
> [James] Esparza was on the [Nuestra Familia] "hit" list that Chavez and Pena had compiled in 1990. Salazar testified that [Petitioner] had ordered him to kill Esparza. [Petitioner] told Salazar that Esparza was in trouble because Esparza was claiming that he was a member of the [Northern Structure], and he was not. Salazar did not carry out [Petitioner's] order because he believed that [Petitioner] had a "personal thing" on Esparza concerning [Petitioner's] girlfriend.

Resp. Ex. 1 at 10–12 (some alterations in original).

B. Standard of Review

This Court may entertain a petition for a writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in

violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The writ may not be granted with respect to any claim that was adjudicated on the merits in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Id. § 2254(d).

"Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the U.S. Supreme] Court on a question of law or if the state court decides a case differently than [the U.S. Supreme] Court has on a set of materially indistinguishable facts." Williams v. Taylor, 529 U.S. 362, 412–13 (2000). The only definitive source of clearly established federal law under 28 U.S.C. § 2254(d) is the holdings (as opposed to the dicta) of the U.S. Supreme Court as of the time of the state court decision. Williams, 529 U.S. at 412; Brewer v. Hall, 378 F.3d 952, 955 (9th Cir. 2004). While circuit law may be consulted to determine whether the circuit "has already held that the particular point in issue is clearly established by U.S. Supreme Court precedent," circuit precedent cannot "refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that [the U.S. Supreme] Court has not announced." Marshall v. Rodgers, 569 U.S. 58, 64 (2013) (per curiam).

"Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the U.S. Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Williams, 529 U.S. at 413. "Under § 2254(d)(1)'s 'unreasonable application' clause, . . . a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." Id. at 411. Instead, a federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was

"objectively unreasonable." Id. at 409. The federal habeas court must presume correct any determination of a factual issue made by a state court unless the petitioner rebuts the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

The state court decision to which § 2254(d) applies is the "last reasoned decision" of the state court. See Ylst v. Nunnemaker, 501 U.S. 797, 803–04 (1991). When there is no reasoned opinion from the highest state court considering a petitioner's claims, the court "looks through" to the last reasoned opinion. See id. at 805.[1] When no state court opinion explains the reasons relief has been denied, "the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." Harrington v. Richter, 562 U.S. 86, 98 (2011).

The U.S. Supreme Court has vigorously and repeatedly affirmed that under § 2254, there is a heightened level of deference a federal habeas court must give to state court decisions. See Dunn v. Madison, 138 S. Ct. 9, 12 (2017) (per curiam); Kernan v. Cuero, 138 S. Ct. 4, 9 (2017) (per curiam); Virginia v. LeBlanc, 137 S. Ct. 1726, 1728 (2017); White v. Wheeler, 136 S. Ct. 456, 461 (2015); Woods v. Donald, 135 S. Ct. 1372, 1376 (2015) (per curiam). As the U.S. Supreme Court has explained, on federal habeas review, § 2254 "imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt." Hardy v. Cross, 565 U.S. 65, 66 (2011) (per curiam) (quoting Felkner v. Jackson, 562 U.S. 594, 598 (2011) (per curiam) (internal quotation marks omitted)). With these principles in mind regarding the standard and limited scope of review in federal habeas proceedings, the Court addresses Petitioner's claims.

[1] The outcome in this case will not be affected by the U.S. Supreme Court's grant of certiorari and forthcoming decision in Wilson v. Sellers, 137 S. Ct. 1203 (2017). In this case, for the eleven claims considered by the California Court of Appeal, neither party disputes that this Court should review the opinion of the Court of Appeal. Moreover, this Court need not consider hypothetical reasons supporting the Court of Appeal's decision on those claims because, as discussed below, the Court of Appeal's stated reasons provide a sufficient basis to deny Petitioner's habeas petition.

C. Claims and Analysis

Petitioner raises the following fourteen grounds for federal habeas relief:

(1) Petitioner contends that he received ineffective assistance of counsel during proceedings on the prosecution's motion to vacate his plea agreement and that his resulting sentence constitutes cruel and unusual punishment;

(2) Petitioner contends that the trial court's restrictions on testimony about the killing of Paul Farfan violated due process and Petitioner's right to confront witnesses;

(3) Petitioner contends that the trial court's restriction of the cross-examination of John Kracht violated due process and Petitioner's right to confront witnesses;

(4) Petitioner contends that the trial court's failure to instruct on second degree murder violated due process, his right to present a defense, and his right to trial by jury;

(5) Petitioner contends that the trial court's failure to instruct the jury to decide whether one or multiple conspiracies existed violated due process and his right to trial by jury;

(6) Petitioner contends that the trial court's failure to instruct the jury to unanimously agree on the facts underlying the conspiracy violated due process and his right to trial by jury;

(7) Petitioner contends that he received inadequate notice of the conspiracy charge in violation of the Sixth Amendment and due process;

(8) Petitioner contends that his conspiracy conviction is unconstitutionally vague;

(9) Petitioner contends that there was insufficient evidence to support his conviction for conspiracy to commit murder;

(10) Petitioner contends that the trial court's failure to modify the withdrawal instruction violated due process, his right to present a defense, and his right to trial by jury;

(11) Petitioner contends that his consecutive 25-years-to-life sentences for murder and conspiracy to commit murder violated his right to trial by jury and due process;

(12) Petitioner contends that his visible shackling throughout the trial violated his right to an impartial jury and due process;

(13) Petitioner contends that he received ineffective assistance of counsel at multiple points during the litigation; and

(14) Petitioner contends that he was denied his Sixth Amendment right to present a defense of his choosing.

Each claim is analyzed in turn below.

1. Proceedings on motion to vacate Petitioner's plea agreement

Petitioner's first claim relates to the proceedings on the prosecution's motion to vacate Petitioner's plea agreement. In March 1993, Petitioner entered into a plea agreement to cooperate with the prosecution. Pet. at 8. The relevant proceedings began in July 1994, when the prosecution moved to vacate Petitioner's plea agreement on the ground that Petitioner had violated the agreement by providing false material information. Resp. Ex. 1 at 19. In granting the prosecution's motion, the trial court relied in part on the results of a polygraph examination of Petitioner, which all of the attorneys—including Petitioner's attorney—had agreed to admit. Resp. Ex. 1 at 19–20. Although Petitioner challenged the propriety of vacating his plea agreement before the California Court of Appeal, he does not renew that challenge here. Instead, he maintains that his attorney provided ineffective assistance of counsel under the Sixth Amendment by failing to conduct an adequate investigation into whether Petitioner would pass a polygraph examination before agreeing to admission. Pet. at 9–10. Petitioner also claims that his resulting sentence of 60 years to life constitutes cruel and unusual punishment under the Eighth Amendment. Pet. at 10–11. The Court addresses these claims in turn.

a. Sixth Amendment right to effective assistance of counsel

The California Court of Appeal rejected Petitioner's ineffective assistance claim, explaining:

> [Petitioner] contends trial counsel deprived him of his Sixth Amendment right to effective assistance of counsel during the proceedings on the motion to vacate his plea agreement by failing to fully investigate the likelihood of his passing a

polygraph examination prior to stipulating to the admission of the results of a polygraph examination. We disagree.

It has repeatedly been held that "'[a] convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components.' 'First, the defendant must show that counsel's performance was deficient.' Specifically, he must establish that 'counsel's representation fell below an objective standard of reasonableness . . . under prevailing professional norms.'" "In addition to showing that counsel's performance was deficient, a criminal defendant must also establish prejudice before he can obtain relief on an ineffective-assistance claim." "Errorless counsel is not required . . . ."

Moreover, "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result." (*Strickland v. Washington* (1984) 466 U.S. 668, 697.)

Here, after the prosecution had filed its motion to set aside the plea agreement, [Petitioner]'s counsel and the prosecutor stipulated that [Petitioner] would submit himself to a polygraph examination by an expert acceptable to both parties, and that the results of the test would be submitted to the court to aid it in its determination of whether [Petitioner] had committed a material breach of the plea agreement. The defense and the prosecution then mutually agreed on FBI special agent Ron Hilley to conduct the polygraph test on [Petitioner]. Hilley concluded that [Petitioner] was deceptive in his answers to the four relevant questions that were related to a particular inconsistency in [Petitioner's] statements.

In its order setting aside [Petitioner's] plea agreement, the court stated that it relied in part on Hilley's testimony.

In arguing ineffective assistance, [Petitioner] asserts that "reasonably competent counsel would not stipulate to the admission of polygraph results without first conducting some investigation to ensure that the stipulated evidence would be favorable to [Petitioner]." [Petitioner] points to no place in the record, however, which would indicate that trial counsel had agreed to the stipulation relating to [Petitioner's] polygraph examination without first reasonably informing himself of the probable outcome of such an examination. [Petitioner] bears the burden of showing to this court that trial counsel's agreement to the polygraph examination stipulation was not an informed decision. . . . "When a defendant on appeal makes a claim that his counsel was ineffective, the appellate court must consider

> whether the record contains any explanation for the challenged aspects of the representation provided by counsel. 'If the record sheds no light on why counsel acted or failed to act in the manner challenged, "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," the contention must be rejected.'"
>
> On this record, [Petitioner] has not carried his burden of showing that trial counsel's decision was not informed. Presuming an informed decision by trial counsel, we must further presume that trial counsel's decision was a tactical choice which we cannot, for such lack of showing, review in this appeal.

Resp. Ex. 1 at 23–25 (some alterations in original) (some citations omitted).

A claim for ineffective assistance of counsel is subject to the two-prong test set forth in Strickland v. Washington, 466 U.S. 668, 687 (1984). First, Petitioner must demonstrate that counsel's performance was deficient, *i.e.*, that it "so undermined the proper functioning of the adversarial process that the [proceedings] cannot be relied on as having produced a just result." Id. at 686–87. In making that assessment, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. at 689 (citation omitted). Second, Petitioner must demonstrate that counsel's deficient performance prejudiced him, *i.e.*, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. The U.S. Supreme Court has described Strickland as imposing a "highly demanding" standard which requires the Petitioner to show "gross incompetence" of his attorney. Kimmelman v. Morrison, 477 U.S. 365, 382 (1986).

Here, the California Court of Appeal did not unreasonably apply Strickland in concluding that Petitioner failed to show that his lawyer's performance was deficient. Petitioner makes the bare assertion that "reasonably competent counsel would not stipulate to the admission of polygraph results without first conducting some investigation to ensure that the stipulated evidence would be *favorable* to [Petitioner]." Pet. at 11. In particular, Petitioner pinpoints his counsel's failure to "conduct[] a preliminary polygraph examination" of Petitioner. Pet. at 10.

But Petitioner does not identify any U.S. Supreme Court authority requiring counsel to perform this specific type of investigation.

And Petitioner's counsel supplies a legitimate basis for his decision. He believed that conducting a preliminary polygraph examination was a bad strategic move. In particular, Petitioner's counsel thought that he would not be able to conduct a secret preliminary polygraph examination of Petitioner in jail. Resp. Ex. 23. Therefore, if Petitioner's counsel conducted the preliminary polygraph and Petitioner failed, a subsequent refusal to submit to the prosecution's requested polygraph could be seen as failure to cooperate and violate Petitioner's plea agreement. Resp. Ex. 23; Resp. Ex. 8, CT 1301–04. Moreover, Petitioner's counsel had reason to believe that Petitioner would pass the polygraph. In an earlier meeting with the prosecution, Petitioner had agreed to take a polygraph examination. Resp. Ex. 23. When the judge suggested using a polygraph examination for the hearing on the motion to vacate Petitioner's plea agreement, Petitioner said that he would pass the test. Resp. Ex. 23; Resp. Ex. 6, RT 17740 ("[Petitioner] said he knew all about polygraphs, he had taken them before and that he could handle it, he could pass it."). Thus, taking into account "counsel's conversations with the [Petitioner]," Strickland, 466 U.S. at 691, Petitioner's counsel stated that he believed Petitioner could pass the examination if he told the truth. Resp. Ex. 23. And Petitioner's counsel conducted the important investigative steps of confirming the qualifications of the polygraph operator to ensure that the results would be accurate. Resp. Ex. 23. In these circumstances, the Court of Appeal did not unreasonably determine that Petitioner's counsel made an informed tactical decision, especially when Petitioner presented minimal evidence to overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. Petitioner is not entitled to habeas relief on this claim.

b. Eighth Amendment prohibition on cruel and unusual punishment

The California Court of Appeal also rejected Petitioner's Eighth Amendment claim, explaining:

> [Petitioner] contends his sentence of 60 years to life violates the federal constitutional protection against cruel and unusual punishment given the improper vacating of his plea agreement under which he would have served only five years. The contention is without merit.
>
> [Petitioner] concedes that "a sentence of 60 years to life for murder and conspiracy is not per se cruel and unusual." [Petitioner] argues merely that because the vacation of his plea agreement was invalid, he should have been entitled to receive the benefit of his bargain, which was a sentence of five years, and, therefore, the 60-years-to-life sentence imposed on him was cruel and unusual.
>
> Because we have determined that the trial court committed no error in setting aside [Petitioner's] plea bargain, [Petitioner's] cruel and unusual challenge also fails.

Resp. Ex. 1 at 23.

It is established that, under the Eighth Amendment's prohibition against cruel and unusual punishment, a sentence that is grossly disproportionate to the crime is unconstitutional. See Solem v. Helm, 463 U.S. 277, 288 (1983); see also Lockyer v. Andrade, 538 U.S. 63, 72 (2003) ("Through this thicket of Eighth Amendment jurisprudence, one governing legal principle emerges as 'clearly established' under § 2254(d)(1): A gross disproportionality principle is applicable to sentences for terms of years."). The U.S. Supreme Court cases, however, are unclear about what factors inform or signify gross disproportionality. See, e.g., Harmelin v. Michigan, 501 U.S. 957, 965 (1991) (opinion of Scalia, J.); id. at 998 (Kennedy, J., concurring in part and concurring in the judgment); Solem, 463 U.S. at 294; see also Lockyer, 538 U.S. at 72 ("Our cases exhibit a lack of clarity regarding what factors may indicate gross disproportionality.").

The California Court of Appeal did not unreasonably apply federal law in concluding that Petitioner's sentence does not violate the Eighth Amendment. Petitioner conceded before the Court of Appeal (and concedes here) that "[a] sentence of 60 years to life for murder and conspiracy is not per se cruel and unusual." Pet. at 12. Given that proportionality is measured against the crime committed, Solem, 463 U.S. at 288, that concession would appear to end the

matter. Petitioner nevertheless argues that his sentence is grossly disproportionate to the sentence that he would have received under the plea agreement and the sentence that other defendants in this case received under their plea agreements. Pet. at 12–13. No cited Supreme Court precedent authorizes such comparisons for determining gross disproportionality under the Eighth Amendment. As the California Court of Appeal observed, evaluating Petitioner's ultimate sentence against the sentence he would have received under his plea agreement is particularly unwarranted because the plea agreement was properly vacated. Resp. Ex. 1 at 23. Moreover, Petitioner's actual sentence of 60 years to life for murder and conspiracy does not appear grossly out of line with some of the comparator defendants, such as Shelton whose plea called for a sentence of 100 years to life for four murders and Salazar whose plea called for a minimum sentence of 50 years to life. Resp. Ex. 6, RT 10006, 13023. Petitioner has not demonstrated entitlement to habeas relief on his Eighth Amendment claim.

2. Examination of witnesses about the killing of Paul Farfan

Petitioner's second claim is that the trial court improperly precluded Petitioner from conducting direct and cross-examinations about the killing of Paul Farfan. Pet. at 13. Petitioner contends that cooperating witness Salazar would have testified that non-witness Vincent Arroyo ordered Farfan's murder, whereas Arroyo would have denied that he authorized the murder. Pet. at 13. In Petitioner's view, that inconsistency would have undermined Salazar's credibility and would have shown that the prosecution knowingly presented false testimony. Pet. at 13–15. Petitioner argues that prohibiting this testimony was a violation of Petitioner's Sixth Amendment right to confront witnesses and his Fourteenth Amendment right to due process. Pet. at 14.

The California Court of Appeal rejected Petitioner's claim, explaining:

> [Petitioner] contends the trial court violated his Sixth and Fourteenth Amendment rights by precluding him from cross-examining two prosecution witnesses and conducting direct examination of one potential defense witness regarding the killing of Farfan, which would have elicited evidence that the prosecution pursued a flawed policy of presenting unreliable accomplice witnesses against [Petitioner]

and that a critical witness against [Petitioner] was unworthy of belief. The contention is without merit.

Salazar, Arroyo, and Mendoza, who were indicted with [Petitioner] and other codefendants, entered guilty pleas. The prosecution thereafter called Salazar and Mendoza to the witness stand, but did not call Arroyo.

[Petitioner] joined a defense motion to allow the defense to cross-examine Salazar regarding the Farfan murder. In particular, the defense wanted to show to the jury that Salazar had made the statement that Arroyo had authorized Farfan's murder, and that Arroyo had denied authorizing Farfan's murder. The attorney representing codefendant [James] Trujeque told the court at a bench conference that "[o]ne of the two of them is lying. And, therefore, there is a problem with the deals that they've cut with the prosecution." The prosecution objected that the proffered evidence constituted impeachment on a collateral matter. The court told the defense that if it decided to bring up the Farfan murder, which happened after the indictment in this case, it did so at its own risk if the evidence turned out to be inadmissible because it would require an admissibility hearing.

On February 7, 1997, prior to Salazar's testimony, the court took up the Farfan issue again. The prosecution argued that evidence relating to the Farfan murder would be admissible only if Arroyo testified, since evidence of Salazar's participation in that murder would then be admissible as a prior bad act for impeachment; moreover, if Salazar's testimony was the result of a plea bargain in which the murder of the Farfan case was dismissed, "then that could be presented also as an issue, although I would say parenthetically that his testimony [was] not predicated on the dismissal of the Farfan case."

The defense agreed with the prosecution that evidence of the Farfan homicide was admissible only if Arroyo testified. However, counsel for codefendant Trujeque expressed his intention to attack Salazar's credibility with the Farfan homicide because Salazar's and Arroyo's statements respecting that homicide contradicted each other. The court asked Trujeque's attorney if he intended to call Arroyo as a witness if the prosecution did not call Arroyo. Trujeque's attorney responded he would do so if Salazar testified that Arroyo had authorized Farfan's murder. The prosecution stated that it had been informed by Arroyo's attorney that if the defense attempted to call Arroyo as a witness, Arroyo would assert his right against self-incrimination, adding that if Arroyo testified the prosecution would not grant Arroyo immunity. The court stated it was disposed to allow the defense to ask Salazar questions relating to the Farfan murder.

On March 17, 1997, just prior to the commencement of Salazar's cross-examination, the defense brought up again the issue of whether it could ask Salazar questions on the Farfan homicide and asked the court for a hearing on the issue. The prosecution restated its intention not to call Arroyo as a witness, and

further told the court that Arroyo's attorney had informed her that Arroyo "will take the Fifth and will not testify if called as a witness by the defense."

The court did not rule on the issue, stating instead that it "would like to see how the situation develops," and inquiring of the defense what it intended to ask Salazar. Trujeque's attorney responded that he would ask Salazar if he (Salazar) had ordered Farfan's murder. If Salazar answered he did not, he (Trujeque's attorney) would then ask Salazar if Arroyo did. The court stated: "Well, let me indicate this, Mr. Salazar has made it clear in no uncertain terms he's testifying truthfully and turned his life around. If you want to impeach his claim of truthfulness by asking him whether he was involved in the Farfan murder, you can. If you, and, I take it, if you do, that's a prerequisite to impeaching him, assuming that he says he was not. [¶] As far as going any further with this witness as to who ordered it and that sort of thing, that's premature. That sounds like you're attempting to set up impeachment of Arroyo. He has not testified yet. We don't know if he's going to testify. Should he testify, we can revisit the issue."

On March 18, 1997, during Salazar's cross-examination, the defense explained its theory of admissibility, which was that the Farfan homicide was an impeachable offense as to Salazar, and would further show that Salazar had a reason not to be truthful about his role in that homicide because his plea agreement was conditioned upon his non-involvement in it. The court replied that if it let in any mention of the Farfan homicide, it would let in all facts surrounding that homicide.

[Petitioner] joined the motion to allow Salazar to be examined about the Farfan homicide.

The court denied the defense request, stating: "[M]y ruling at this point subject to counsel persuading me differently is that that subject is not to be covered in cross-examination. I will sustain the [Evidence Code section] 352 objection. In so doing I'm considering the amount of time that we would have to devote to the Farfan matter. But more than that, I'm also considering everything I've heard in cross-examination so far, and I used the term ammunition, it's not a legal term. There's been a wealth of evidence that has been used so far to attack the credibility of this witness, and what has occurred so far during cross-examination. And it seems to me the Farfan matter isn't something crucial. So I find the relevancy to be substantially outweighed by undue consumption of time and confusing the issues."

On March 19, 1997, the court allowed the parties to discuss the Farfan homicide issue further. The defense made an offer of proof that included the following: (1) Salazar's ex-wife became romantically involved with Farfan in the late summer of 1992, and the two lived openly together in January 1993; (2) Salazar knew that

> his ex-wife was living with Farfan; (3) Salazar stated in his June 23 statement to the police that while he was in a holding cell in early 1993, he heard Arroyo say that a "green light" should be placed on Farfan because Farfan had cheated the [Nuestra Familia] out of its money; (4) in September 1993, Farfan told parole agent E.J. Allen that his (Farfan's) life was in danger because he was dating Jessica Salazar and another woman; (5) Farfan was murdered on September 27, 1993; (6) Salazar met Louis Oliverez in 1989; (7) on October 7, 1993, Nancy Hermocillo told the police that on September 23, 1993, which was four days prior to Farfan's murder, she was at a friend's house and overheard a telephone conversation between Salazar and Oliverez wherein Salazar had asked Oliverez to kill Farfan; and (8) Salazar's plea agreement was conditioned upon Salazar's noninvolvement in the Farfan murder.
>
> On March 26, 1997, the court once more denied the defense motion, reasoning that the prosecution did not intend to call Arroyo as a witness. The court admitted that the proffered evidence was relevant, but found it inadmissible under Evidence Code section 352 because admission of the evidence would confuse the jury and consume an undue amount of time. The court explained: "The issue of the admissibility of testimony concerning Paul Farfan, as I recall, arose in the context of a discussion at the bench where it was anticipated that Mr. Salazar and Mr. Arroyo would both testify. And the offer of proof was that their testimony would conflict as it relates to the subject of the green light on Paul Farfan, thus establishing that someone's not telling the truth, whether it's Mr. Salazar or whether it is Mr. Arroyo. And at that time, as I recall, I indicated preliminarily that I would allow some questioning in that area. [¶] Now, since that discussion, my understanding at this point is that Mr. Arroyo is not going to be testifying as a witness. That may change. If he does testify as a witness, this issue undoubtedly will be revisited, because I invite Mr. Mayfield [counsel for Trujeque] to revisit the issue. But the issue is not squarely before the court now. [¶] . . . [¶] The issue as I indicated is a [Evidence Code section] 352 issue. It is not a relevancy issue because obviously this testimony satisfies in my opinion the defense of relevant evidence in California. But being a [Evidence Code section] 352 issue, the court has to look at the probative value and weigh it against the possibility of confusing the issues, principally confusing the jury as well as the undue consumption of time. [¶] Now, the justification for offering this testimony in a very general sense is two-fold. One, it's the credibility of Jerry Salazar. And then, No. 2, something that I have quite—I have not completely understood, that is, Mr. Selvin [counsel for codefendant Herminio Serna], the argument about the theory—the theory of the conspiracy, its admissibility under the theory of the conspiracy. [¶] . . . [¶] Credibility is a very broad term. Whether they're talking about credibility in a general sense that Jerry Salazar is a liar or in a more specific sense that he's a liar in this particular case, has lied, and even more particularly has violated the plea agreement by not telling the truth. We're still talking about credibility. [¶] . . . [¶] [S]o far as it relates to Mr. Salazar, he has been impeached about prior inconsistent statements in a number of instances by

> defense counsel. Additionally, he's admitted lying in the past, and not just as it relates to the June '93 interview, but he has been compelled or persuaded to admit that he lied in other instances on the witness stand. [¶] Defense counsel certainly can argue the significance of his inconsistent statements, certainly can be argued that he has lied and is in fact an admitted liar. [¶] But not only that, as it relates to the use of the Farfan murder as an example of an act of moral turpitude which bears on his credibility, Mr. Salazar has been confronted with a number of instances that counsel can use to argue the point of credibility. [¶] There's the bowling alley set up that Mr. Salazar was involved [in] whereby an individual from Fresno was robbed and pistol whipped. [¶] There's the incident at J.P.'s involving two Chinese males that Mr. Salazar was involved with whereby he . . . sucker punched one of the individuals after apologizing to him, suggesting that he is a man of bad character not simply because he's violent, but there's also the suggestion he's homophobic. [¶] There's an incident described in the testimony at a disco where Mr. Salazar was there with Mr. Lopez and Mr. Shelton. [¶] There's the incident involving Roland Saldivar's uncle where Salazar admitted on the stand that he pointed a gun at the individual. [¶] There's the issue involving Mr. Urango where Mr. Salazar admitted to looking for him to kill him. [¶] There's the incident at King and Story Road where Mr. Salazar was the driver and a passenger shot, apparently wounding several Surenos. [¶] There's the incident involving . . . Alex Flemate, where Mr. Salazar was involved in a plot to kill him. [¶] There's the issue involving Spookio. And one of the interpretations of the evidence that I would assume the defense would find favorable was their suggestion that Mr. Salazar was involved in a plot to kill Spookio motivated by jealousy. [¶] There's the Beto Jasso incident, attempted killing of Carlos Mejias, that Mr. Salazar was involved in. [¶] We heard about a New Years incident I believe in Watsonville where Mr. Salazar had a stabbing instrument and apparently stabbed the wrong person by accident. [¶] We've heard that he planned the murder of one of the defendants in this case, [Petitioner]. [¶] There's even been a suggestion that when he was thrown in the hole when he was in prison just before his release that he was involved in some inappropriate activity. [¶] And then I also made note of his involvement in a robbery of a drug dealer in the City of Fresno. And there are others. [¶] The point I'm making is there's ample evidence to attack the credibility of Mr. Salazar based not only on his inconsistent statements of his admissions of being untruthful, but based on a number of specific instances. This is significant because in my opinion it lessens the probative value of the Paul Farfan incident. [¶] So what I find is the probative value, although there is some probative value, is not particularly extensive for all the reasons that I listed, and in particular the specific instances which counsel has inquired into already. [¶] What I do find is to allow the inquiry into the Paul Farfan incident as described in the offer of proof will cause undue consumption of time and can lead to the confusing of the jury in this case because one possible situation is a mini-trial where the death of Paul Farfan will be litigated. Certainly the People are allowed to litigate that issue if I allow the defense to do so. [¶] In short, I find that the probative value is outweighed by the

factors I cited. The court's ruling is the testimony is not admissible. [¶] I want to remind in particular Mr. Mayfield, if we have a situation arise similar to what we envisioned in the past, we, being all of us, involving Mr. Arroyo testifying, then the court is happy to revisit the issue."

On April 16, 1997, the defense again sought to bring out the issue of Salazar's perjury on the basis of the conflict between Salazar, who said that Arroyo had authorized Farfan's murder, and Arroyo, who denied authorizing such murder. The defense wanted to question Mendoza, who Salazar said was present when Arroyo gave the green light to murder Farfan. Trujeque's counsel argued that he should be allowed to question Mendoza whether Arroyo had given the "green light," and be allowed to call Arroyo to ask whether he authorized the murder.

The prosecution responded that if the court allowed evidence of the Farfan homicide to come in, it was going to prove that what Salazar had said was true.

The court reiterated its ruling that evidence of the Farfan homicide was inadmissible, adding: "It was mentioned this afternoon that as it relates to the issue of credibility, Mr. Mayfield indicated he wanted to establish that Salazar will lie about murders. Well, that's already been established in the testimony that he made some false accusations as it relates to who participated in what, and I know you're all familiar with that testimony. [¶] The right to confront and cross-examine is not without limitation as we all know. And I feel that as it relates to Mr. Salazar, he has been confronted and cross-examined, not only at length, but with reference to a number of subjects where counsel would be able to argue forcefully that the man is a liar when this case is argued."

On August 15, 1997, the court denied [Petitioner's] motion for a new trial which [Petitioner] based, inter alia, on the ground of error in precluding evidence relating to the Farfan incident.

The standard of review for Evidence Code section 352 challenges is abuse of discretion. "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

On appeal, "'[a] trial court's exercise of discretion will not be disturbed unless it appears that the resulting injury is sufficiently grave to manifest a miscarriage of justice. In other words, discretion is abused only if the court exceeds the bounds of reason, all of the circumstances being considered.'"

The underlying assumption in [Petitioner's] challenge is that the proffered evidence relating to the Farfan incident would have shown that either Salazar or Arroyo was lying. The assumption is flawed. The prosecution repeatedly told the

> parties and the court that it was not going to call Arroyo as a witness, and, in fact did not call Arroyo. Because Arroyo did not testify, his version of the story was not before the jury. Consequently, the jury did not know that Arroyo's version was in conflict with Salazar's version. It follows that while Arroyo's version was relevant as tending to discredit Salazar, the court could reasonably conclude it was not probative enough to outweigh its potential for prejudice in terms of time consumption and issue confusion. The prosecution had indicated that if Arroyo testified, it would adduce evidence to prove that Salazar was telling the truth. The court, for its part, stated that if it allowed the defense to bring out evidence relating to the Farfan incident, it would also have to allow the prosecution to litigate the issue. The result would be a minitrial on a crime with which [Petitioner] was not charged, resulting in jury confusion and inordinate consumption of time.
>
> [Petitioner] argues that the trial court's concern that allowing Salazar to be questioned on the Farfan incident would result in undue consumption of time was not well-founded because the trial was in fact finished several months earlier than estimated. The argument is not persuasive. "Undue consumption of time" refers not only to the time used to try the case, but also the time lost to the court by giving one case more time than needed, to the prejudice of other cases which could have productively used the time wasted. Here, the trial took five months of the court's time. Giving this case more time than was reasonably necessary was prejudicially taking off time from other cases that needed judicial attention just as well.
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> . . .
>
> We are also not persuaded by [Petitioner's] argument that "the excluded evidence would have shown that the prosecution knowingly presented false or at least misleading testimony." The prosecution was ready to prove that Salazar was telling the truth had [Petitioner] been allowed to examine Salazar about the Farfan incident.
>
> We conclude the trial court did not abuse its discretion in disallowing evidence relating to the Farfan homicide.

Resp. Ex. 1 at 25–34 (some alterations in original) (citations omitted).

In some circumstances, a trial court's restrictions on a defendant's presentation of evidence may violate the defendant's right to present a defense. That is because, "[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the . . . Confrontation [Clause] of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" Crane v. Kentucky, 476 U.S. 683, 690 (1986) (citations omitted).

The right to present evidence, however, is not absolute. See Taylor v. Illinois, 484 U.S. 400, 410 (1988) ("The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence."). Although the defense must be given a chance to expose an adverse witness's motivation in testifying, the trial judge retains "wide latitude" to "impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986).

The California Court of Appeal did not unreasonably apply federal law in holding that the trial court did not violate Petitioner's right to present a defense by circumscribing any questioning about the killing of Farfan. Petitioner relies upon two U.S. Supreme Court cases, Crane and Van Arsdall, which involved situations where the circumstances more compellingly outweighed the state's interest in trial administration. In Crane, the Supreme Court concluded, "on the facts of th[e] case," that the state deprived the defendant of the opportunity to present his defense when the state offered no valid justification for "the blanket exclusion" of "competent, reliable evidence" that pertained to "the credibility of [the defendant's] confession" and, thus, was "central to the defendant's claim of innocence." 476 U.S. at 690. The Court highlighted the "peculiar circumstances of th[e] case," in which the defendant's "entire defense was that there was no physical evidence to link him to the crime and that, for a variety of reasons, his earlier admission of guilt was not to be believed." Id. at 691. In Van Arsdall, the Supreme Court found constitutional error because "the trial court prohibited *all* inquiry into the possibility that [the prosecution's witness] would be biased as a result of the State's dismissal of his pending public drunkenness charge." 475 U.S. at 679. While recognizing that the defense is not entitled to put on any cross-examination that it wishes, the Court explained that the trial court violated the defendant's rights when the court "cut[] off all questioning about an event that the State conceded

had taken place and that a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony." Id.

It is not unreasonable to characterize Petitioner's case as materially different from Crane and Van Arsdall. Here, the trial judge had a sufficient non-arbitrary basis to bar Petitioner's questioning under section 352 of the California Evidence Code, which permits exclusion for undue consumption of time on a collateral issue. Petitioner's proposed questions were designed to cast doubt on Salazar's credibility by demonstrating a conflict between Salazar's and Arroyo's stories about who, if anyone, had ordered a hit on Farfan. However, the prosecution did not call Arroyo as a witness, so his version of events was not before the jury. And the prosecution was ready to prove that Salazar's version of events was the correct one. Thus, allowing Petitioner's questioning would have required a mini-trial on the killing of Farfan, "a crime with which [Petitioner] was not charged," and these significant diversions would likely result in "jury confusion and inordinate consumption of time." Resp. Ex. 1 at 33. This case is unlike Van Arsdall because the questioning there related to an event that the prosecution conceded had taken place. In this case, moreover, Petitioner cross-examined Salazar on a number of other topics and had ample opportunity to argue that Salazar was lying. Therefore, introducing this testimony was not as necessary as probing the motive of the prosecution's witness in Van Arsdall or attacking the credibility of the defendant's confession in Crane. Indeed, in other cases, the Supreme Court has expressed particular concern when the state rule is so broad as to prevent the admission of "the only testimony available on a crucial issue." Washington v. Texas, 388 U.S. 14, 21 (1967). The California Court of Appeal could reasonably credit these relevant differences between Petitioner's case and the cited Supreme Court cases.

Petitioner separately contends that the trial court's exclusion was constitutionally improper because it prevented Petitioner from showing that the prosecution presented Salazar's testimony despite knowing that he was lying. It is true that a state violates due process when it knowingly presents false evidence to obtain a conviction. See Napue v. Illinois, 360 U.S. 264, 269 (1959);

see also Giglio v. United States, 405 U.S. 150, 153–54 (1972). Petitioner cannot, however, make out such a claim here. Although the prosecution entered into plea agreements with both Salazar and Arroyo, the prosecution did not call Arroyo as a witness, so the issue of whether Salazar or Arroyo was telling the truth did not (and could not) arise at trial.[2] And if the trial court allowed Petitioner to admit testimony about the Farfan homicide, the prosecution intended to prove that Salazar, not Arroyo, was telling the truth. Therefore, as the California Court of Appeal reasoned, the prosecution did not knowingly present any false testimony. Resp. Ex. 1 at 34. Accordingly, the Court of Appeal did not unreasonably determine that the exclusion of Petitioner's Farfan-related questions did not violate his Sixth and Fourteenth Amendment rights, and Petitioner is not entitled to habeas relief on this claim.

3. Cross-examination of John Kracht

Petitioner's third claim is that the trial court unduly restricted the scope of cross-examination of one of the prosecution's witnesses, investigator John Kracht. Pet. at 15–16. Specifically, the trial court ruled that Petitioner's questions about whether Kracht closed an investigation into a robbery involving Pablo Pena were irrelevant and tangential. Resp. Ex. 1 at 36–37. Petitioner asserts that these limitations violated his Sixth Amendment right to confront witnesses and his Fourteenth Amendment right to due process. Pet. at 15.

The California Court of Appeal rejected Petitioner's claim, explaining:

> [Petitioner] contends the trial court violated his Sixth and Fourteenth Amendment rights to confrontation and due process by unduly restricting the scope of cross-examination of John Kracht regarding the disposition of a case against Pena, which would have shown that [Petitioner] had no motive to agree to kill Rosas and thus prejudiced his defense against the charges of murder and conspiracy to commit murder. We disagree.

[2] Petitioner does not suggest that the prosecution failed to disclose that Salazar and Arroyo had provided opposing statements about the Farfan homicide to the prosecutors. In the response, Respondent represents that the prosecution fulfilled its duty by "disclos[ing] each statement" to the defense. Resp. at 32 n.8.

Rosas was murdered on June 26, 1991, by assailants who were not identified. The prosecution's evidence showed that [Petitioner] authorized Rosas's murder because Rosas had identified Pena as the person who had earlier robbed Petra Gonzalez, who was the mother of Rosas's girlfriend. The prosecution's evidence consisted of Pena's confession, statements made by several [Nuestra Familia] members, and evidence of the actual robbery itself wherein Gonzalez identified Pena to the police as one of the robbers. Gonzalez testified that two masked men broke into her home on December 31, 1983, and that Rosas went to her defense. Gonzalez did not know who Pena was and did not recall if Pena was one of the intruders.

John Kracht, the district attorney's investigator, testified that he used to be employed by the San Jose Police Department and that, while employed as such, he had investigated the Rosas robbery and had spoken to Gonzalez. Gonzalez identified Pena's picture as that of one of the robbers. Gonzalez also told Kracht that Pena had held a knife to her neck and had cut her.

During cross-examination, the defense asked Kracht whether his reports with reference to the Rosas robbery investigation were closed; whether he ever testified at a trial involving Pena regarding the Rosas robbery; and whether he ever appeared in court "with reference to charges brought against Pablo Pena as a result of this incident." The prosecution objected to the questions on relevancy grounds. The court sustained the objections. Trujeque's counsel requested a hearing on the defense objection. The court granted the request, and a hearing was held out of the presence of the jury.

At the hearing, the defense stated, as an offer of proof, that Pena was not prosecuted for the Rosas robbery, and this lack of prosecution showed that the prosecution's theory was not viable. The defense further stated that because Pena was not prosecuted, "there never was any way that [Pena] would know that anything happened."

The court ruled that the objected questions were irrelevant, and, in any event, the relevancy of the questions was "greatly outweighed by undue consumption of time on a collateral issue, really."

We find no error. Pursuant to Evidence Code section 210, "relevant evidence" is evidence that has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." Trial courts have wide discretion in determining the relevancy of evidence.

The fact that was of consequence which the defense sought to establish with the challenged questions was the viability of the prosecution theory that [Petitioner] authorized the murder of Rosas because Rosas had identified Pena as one of the robbers in the Rosas robbery. [Petitioner's] argument is that such theory was not

> viable because Kracht's investigation of the Rosas robbery had been closed, and Kracht had not appeared in court in regard to any charges brought against Pena respecting the Rosas robbery.
>
> We fail to see the logic of the argument. The closure of Kracht's investigation, and the fact that Kracht never appeared nor testified at a trial involving the Rosas robbery, did not mean that Rosas was without other means of knowing that Pena was involved in the Rosas robbery. Rosas's knowledge of Pena's participation could have come from sources other than Kracht's investigation or court testimony. In fact, Rosas was present when the robbery took place, and even went to the defense of Gonzalez. Pena, as one of the robbers, likely knew of Rosas's presence during the robbery and of Rosas's role in coming to the defense of Gonzalez. There is evidence that in late June 1991, [Petitioner] told Salazar that there was a "green light" on Rosas because Rosas had "snitched on Pablo Pena, Panther." Chavez testified that while he was in prison with Pena, Pena had told him that he (Pena) had robbed Rosas's home. There is also evidence that after Rosas's murder, Shelton asked [Petitioner] about it, and [Petitioner's] reply was: "Fuck that punk, I just told them [Chavez and Salazar] to deal with it, that he [Rosas] had some situation with Panther [Pena]."
>
> Because the questions of whether Kracht had closed his investigation and whether he had appeared or testified at a trial involving the Rosas robbery did not foreclose the prosecution theory that [Petitioner] had authorized the murder of Rosas because Rosas knew that Pena was involved in the Rosas robbery, the trial court did not exceed the bounds of reason, and therefore did not exceed its discretion, in sustaining the prosecution's objections to the challenged cross-examination questions on relevancy grounds.
>
> Moreover, the trial court stated that, in any event, the relevancy of the questions was "greatly outweighed by undue consumption of time on a collateral issue." [Petitioner] has not seriously challenged this Evidence Code section 352 determination by the trial court, except to point out that only two questions were objected to. It is not possible to tell, however, how many more questions on the subject might have been asked, and how much more time might have been spent by both sides on the issue, had no timely objections been made to the initial questions, and had not the trial court sustained the objections.

Resp. Ex. 1 at 34–37 (some alterations in original) (citation omitted).

As spelled out above, the question whether a trial court so restricted a defendant's presentation of evidence as to violate the right to present a defense implicates competing considerations. On the one hand, the Sixth and Fourteenth Amendments "guarantee[] criminal defendants 'a meaningful opportunity to present a complete defense.'" Crane, 476 U.S. at 690

(quoting California v. Trombetta, 467 U.S. 479, 485 (1984)). In the context of impeachment, the defense must be given "reasonable latitude" to cross-examine witnesses in order "to place the witness in his proper setting and put the weight of his testimony and his credibility to a test." Smith v. Illinois, 390 U.S. 129, 132 (1968) (quoting Alford v. United States, 282 U.S. 687, 692 (1931)). On the other hand, trial judges retain "wide latitude" to "impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." Van Arsdall, 475 U.S. at 679; see also United States v. Scheffer, 523 U.S. 303, 308 (1998) ("A defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions."). State rules excluding evidence from criminal trials therefore "do not abridge an accused's right to present a defense" as long as they are not arbitrary or disproportionate. Scheffer, 523 U.S. at 308.

The California Court of Appeal did not unreasonably apply these cases in concluding that the trial court did not unduly restrict the scope of Petitioner's cross-examination of Kracht. In sustaining the objections to Petitioner's cross-examination questions, the trial court relied on sections of the California Evidence Code that allow exclusion for lack of relevance and undue consumption of time on a collateral issue. And the trial court's rulings in those regards are reasonable, non-arbitrary limits on the scope of cross-examination because Petitioner sought to ask questions that had minimal, if any, relevance. The prosecution's theory of the case was that Petitioner's motive to have Rosas killed was that Rosas had snitched on a Nuestra Familia member, Pena, by identifying him as the perpetrator of a robbery. Petitioner desired to cross-examine investigator Kracht about the disposition of Pena's robbery prosecution—namely, that Kracht had closed the case and that Kracht had not appeared or testified at a trial involving the robbery. However, the fact that Pena was not prosecuted for robbery does not answer whether Rosas knew that Pena committed the robbery or whether Rosas identified Pena as the robber. The Court of Appeal documented other ways that Rosas could have known of Pena's involvement—

including that Rosas was present during the robbery and that Pena shared that information in prison—and pointed to evidence supporting the conclusion that Petitioner ordered Rosas's murder for snitching on Pena. Resp. Ex. 1 at 36. The prosecution also presented evidence that Petitioner confessed that he ordered Rosas's murder because "[Rosas] had some situation with [Pena]." Resp. Ex. 1 at 36. Accordingly, the Court of Appeal did not unreasonably determine that the exclusion of Petitioner's cross-examination questions did not violate his Sixth and Fourteenth Amendment rights, and Petitioner is not entitled to habeas relief on this claim.

4. Failure to instruct on second degree murder

Petitioner's fourth claim is that, based on the substantial evidence that Petitioner acted in a rash manner in responding to a call from Chavez, the trial court had a sua sponte duty to instruct the jury on second degree murder. Pet. at 16–17. According to Petitioner, the trial court's failure to instruct amounted to a violation of his Sixth Amendment right to present a defense and to a trial by an impartial jury as well as his Fourteenth Amendment right to due process. Pet. at 17.

The California Court of Appeal rejected Petitioner's claim, explaining:

> [Petitioner] contends the trial court violated [Petitioner's] state and federal constitutional rights to due process and an impartial jury trial by refusing to instruct the jury on the lesser included offense of second degree murder with respect to . . . the murder of Rosas in count 12. The contention is without merit.
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> . . .
>
> As to count 12, the Rosas murder, [Petitioner] requested the trial court to instruct the jury on second degree murder. The prosecution objected, arguing that, as to that murder, [Petitioner] was either guilty of conspiracy to commit first degree murder or not guilty of any crime. The court denied [Petitioner's] request, stating: "As it relates to [Petitioner], . . . it's either a first degree murder or it's not a first degree murder. I expect—or based on what I've observed during the course of this trial, that the credibility of witnesses who will testify about [Petitioner] will be attacked. The argument is going to be he didn't commit any crime. To the extent he did, the evidence suggests in my opinion that if there was a crime, it's a first degree murder. Therefore, I don't believe it's appropriate to instruct on second degree murder."

As the court expected, [Petitioner's] counsel subsequently argued to the jury that [Petitioner] was not guilty at all of the Rosas homicide.

The trial court's duty to instruct on lesser included offenses has been summarized, thus: "'It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.' That obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present but not when there is no evidence that the offense was less than that charged. The obligation to instruct on lesser included offenses exists even when as a matter of trial tactics a defendant not only fails to request the instruction but expressly objects to its being given. Just as the People have no legitimate interest in obtaining a conviction of a greater offense than that established by the evidence, a defendant has no right to an acquittal when that evidence is sufficient to establish a lesser included offense."

Further, """"[i]t has long been settled that the trial court need not, even if requested, instruct the jury on the existence and definition of a lesser and included offense if the evidence was such that the defendant, if guilty at all, was guilty of something beyond the lesser offense."""

[Petitioner] claims that he acted rashly, and therefore without deliberation or premeditation, when he approved the Rosas murder. The claim is not supported by the facts on record.

The record shows that in late June 1991, [Petitioner] told Salazar that there was a "green light" on Rosas because Rosas had "snitched on Pablo Pena, Panther." However, before the green light was executed, [Petitioner] wanted confirming "paperwork" because if Rosas was killed and [Petitioner] was wrong, [Petitioner] would himself be killed. Chavez testified that on the night Rosas was killed, he received a telephone call from Roy Reveles and Tim Hernandez asking him for authority "[t]o hit Little Eli [Rosas]." Chavez told Hernandez that he "didn't have the authority to make any decisions." Chavez then contacted Salazar, who contacted [Petitioner]. In a three-way telephone discussion with Salazar and [Petitioner], Chavez told [Petitioner] that Reveles and Hernandez had asked for his authority to kill Rosas and that he had told them that he "couldn't make that decision." Chavez asked [Petitioner] what he was to do. [Petitioner] told Chavez to "do what you got to do," which meant to "kill [Rosas]."

This three-way telephone conversation took place while [Petitioner] was at the home of Michelle Valderama, his sister-in-law. Valderama overheard [Petitioner's] side of the conversation, including the name "Eli," which was how

> Rosas was called, and [Petitioner's] instruction to the caller to "just do what you got to do," and for the caller to let him know what happened.
>
> Subsequently, when [Petitioner] and Shelton were at San Quentin, [Petitioner] told Shelton, in referring to Rosas: "Fuck that punk, I just told them [Chavez and Salazar] to deal with it, that he [Rosas] had some situation with Panther [Pena]," and that Rosas was behind "some drug deal that some drugs were involved and that [Rosas] had supposedly had snitched on [Pena] who's also [a Nuestra Familia] member."
>
> The foregoing facts demonstrate premeditation and deliberation, not rashness. If the jury accepted the facts as true, the killing of Rosas was murder of the first degree. If the jury did not believe the foregoing evidence, particularly that relating to the three-way conversation among [Petitioner], Chavez, and Salazar, then [Petitioner] was not guilty of any crime. There was no middle ground.
>
> Accordingly, we conclude the trial court did not err in refusing to give the second degree murder lesser included offense instruction.

Resp. Ex. 1 at 37–40 (some alterations in original) (citations omitted).

In some circumstances, failure to give requested instructions violates due process. Specifically, the U.S. Supreme Court has held that in a capital case, where the evidence supports a verdict on a lesser-included offense, failure to instruct a jury on that lesser-included offense constitutes a violation of due process. Hopper v. Evans, 456 U.S. 605, 610–11 (1982); Beck v. Alabama, 447 U.S. 625, 634–38 (1980). However, the Supreme Court has limited application of that rule to the capital context. In 1973, the Court explained that it "ha[d] never explicitly held that the Due Process Clause of the Fifth Amendment guarantees the right of a defendant to have the jury instructed on a lesser included offense." Keeble v. United States, 412 U.S. 205, 213 (1973). When the Court later held that due process requires giving such an instruction in capital cases, the Court made clear that it was "not decid[ing] whether the Due Process Clause would require the giving of such instructions in a noncapital case." Beck, 447 U.S. at 638 n.14. Based on those express reservations, the California Court of Appeal could reasonably decline to extend Hopper and Beck to this noncapital case. Therefore, the Court of Appeal did not unreasonably

apply Hopper or Beck in concluding that the trial court did not deprive Petitioner of due process by refusing to instruct the jury on second degree murder.[3]

Petitioner also cites two Ninth Circuit decisions—United States v. Escobar de Bright, 742 F.2d 1196, 1201–02 (9th Cir. 1984), and United States v. Unruh, 855 F.2d 1363, 1372 (9th Cir. 1987)—for the proposition that "[f]ailure to instruct upon the defendant's theory of the case, where there is evidence to support the instruction, is a violation of the Sixth Amendment right to present a defense and to a trial by jury, and the Fourteenth Amendment right to due process." Pet. at 17. As noted above, circuit precedent cannot "refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that [the U.S. Supreme] Court has not announced." Marshall, 569 U.S. at 64. Escobar de Bright and Unruh were both direct appeals, and neither purports to hold that the U.S. Supreme Court has "clearly established" that failing to instruct on the defendant's theory is a constitutional violation, let alone that that rule derives from U.S. Supreme Court precedent at all. These cases cannot serve as the basis for granting habeas relief to Petitioner. See Marshall, 569 U.S. at 64.

In any event, even if the above-referenced cases applied in this instance, Petitioner would not be entitled to habeas relief. All of the cases hold that an instruction is necessary only if the evidence supports a verdict on a lesser-included offense, but, as the California Court of Appeal reasoned, the evidence in Petitioner's case does not support a verdict on second degree murder. Petitioner points to only two facts in the record: (1) he was in bed when the three-way call came in and (2) he told Chavez on the phone, "You know what time it is, Louie? You shouldn't even have to make this call." Resp. Ex. 6, RT 17373, 12221. On their own, those facts do not indicate that Petitioner "was obscured or disturbed by passion to such an extent as would cause the ordinarily

[3] Petitioner's reliance on Rose v. Clark, 478 U.S. 570, 578 (1986), is misplaced. In the cited passage, the U.S. Supreme Court held that where a trial judge directs a verdict for the prosecution in a criminal jury trial, harmless-error analysis does not apply because "the wrong entity judged the defendant guilty." Id. at 578. Here, there is no contention that the trial judge entered a judgment of conviction or directed the jury to reach a particular verdict.

reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment." People v. Lee, 971 P.2d 1001, 1007 (Cal. 1999) (citation omitted). Moreover, the California Court of Appeal detailed the other facts, including testimony from multiple witnesses that Petitioner had ordered the hit on Rosas and testimony from one witness that Petitioner had admitted to authorizing the murder, that strongly support premeditation and deliberation, not rashness. Accordingly, Petitioner has not shown entitlement to habeas relief on this claim.

5. Failure to instruct jury to decide whether one or multiple conspiracies existed

Petitioner's fifth claim is that the trial court erred when it failed to instruct (and therefore the jury did not decide) whether one or multiple conspiracies existed. Pet. at 17–18. Petitioner's argument appears to be that his Sixth Amendment right to trial by jury and his Fourteenth Amendment right to due process were violated because the jury did not determine a material fact necessary for guilt—namely, whether there was one conspiracy or multiple conspiracies. Pet. at 17–18.

The California Court of Appeal rejected Petitioner's claim, explaining:

> [Petitioner] contends the trial court deprived [Petitioner] of his state and federal constitutional rights to a trial by jury and due process by failing to instruct the jury to determine the essential factual question whether one or multiple conspiracies existed. We disagree.
>
> On conspiracy, the defense proposed a modified version of CALJIC No. 6.10, to read as follows: "If you find the existence of a conspiracy beyond a reasonable doubt, you must determine whether a single or multiple conspiracies have been proven. If there was one overall agreement among the various parties to perform various functions to carry out the objectives of the conspiracy, then there is but a single conspiracy. If there were separate agreements each of which had its own distinct, illegal end and which were not drawn together in a single, overall, comprehensive plan, then each such agreement is a separate conspiracy. [¶] The indictment alleges only a single count of conspiracy. If you find the existence of multiple conspiracies, a defendant may be found guilty of conspiracy if the proof shows beyond a reasonable doubt that he participated in one or more of the conspiracies. However, to find a defendant guilty of conspiracy you must unanimously agree as to which conspiracy or conspiracies he participated in. It is

not necessary that the particular conspiracy or conspiracies agreed upon be stated in your verdict."

The prosecution objected to this proposed instruction, arguing that while there was one umbrella conspiracy, which was the NF, "there have to be some specific efforts on the part of each conspirator to join in that conspiracy as a—if you would like, a mini conspiracy within the ambit of the larger one. Obviously, the larger one is the [Nuestra Familia] doing evil things as a group, but we have never gone so far as to say that simply joining the [Nuestra Familia] makes one responsible for all of the crimes then committed by the gang itself, necessarily. But in terms of the umbrella conspiracy and for [Evidence Code section] 1223 there is such an umbrella conspiracy to commit crimes, the named crimes in general. But that's why in terms of the verdict form and also the accomplice stuff and all of the rest of it, we have specific murder object, object crimes, that is, the murder of certain specific individuals. The subjects of the object crimes, if you will."

The court refused the proposed instruction, stating that it found the last two paragraphs thereof, which deal with multiple conspiracies, "potentially very confusing."

The next day, the court announced: ". . . I've rethought my position. As you know, I've indicated before that I felt that the jury would not only have to find unanimously which of the target crimes were the subject of the conspiracy, but I went on to indicate that I felt they would have to be unanimous as to which particular event associated with the target crimes, for example, which murder. And in keeping with that position, I felt that the jury verdict forms should be specific as to possible victims, where they could not only demonstrate their unanimous opinion concerning the target crime, but which particular event. [¶] After reconsidering, I've come to the conclusion I was wrong. And it's my opinion that the jury need only be unanimous about the target crimes, that they don't have to unanimously agree as to which event, nor does that have to be reflected in the jury verdict form, whether it be which murder or which robbery or which distribution of controlled substances. [¶] I am not inclined, still, to give the instructions requested by the defense dealing with multiple conspiracies, and the record is clear as to the proposed instructions which I rejected already."

The court then gave the jury the following instruction on conspiracy (CALJIC No. 6.10): "A conspiracy is an agreement entered into between two or more persons with the specific intent to agree to commit an object crime or crimes and with the further specific intent to commit the object crime or crimes followed by an overt act committed in this state by one or more of the parties for the purpose of accomplishing the object or objects of the agreement. Conspiracy is a crime. [¶] In order to find a defendant guilty of conspiracy, in addition to proof of the unlawful agreement and specific intent, there must be proof of the commission of

> at least one of the acts alleged in the indictment to be an overt act and that the act committed was an overt act. It is not necessary to the guilt of any particular defendant that defendant personally committed the overt act, if he was one of the conspirators when the alleged overt act was committed. [¶] The term 'overt act' means any step taken or act committed by one or more of the conspirators which goes beyond mere planning or agreement to commit a crime and which step or act is done in furtherance of the accomplishment of the object of the conspiracy. [¶] To be an 'overt act,' the step taken or act committed need not, in and of itself, constitute the crime or even an attempt to commit the crime which is the ultimate object of the conspiracy. Nor is it required that the step or act, in and of itself, be a criminal or an unlawful act."
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> The jury was also instructed pursuant to CALJIC No. 6.25: "In order to find a defendant guilty of the crime of conspiracy, you must find beyond a reasonable doubt that a defendant conspired to commit one or more of the object crimes of the conspiracy, and you also must unanimously agree as to which particular crime or crimes he conspired to commit. [¶] If you find defendant guilty of conspiracy, you will then include a finding on the question as to which alleged object crimes you unanimously agree a defendant conspired to commit. A form will be supplied for that purpose for each defendant."
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> In addition, because of the allegation in the indictment that the conspiracy was committed for the benefit of a criminal street gang, the court instructed the jury that "[i]f you find a defendant guilty of any crime charged, then you must decide if he committed that crime or those crimes for the benefit of, at the direction of, or in association with a criminal street gang."
>
> [Petitioner] argues that the question of whether one or more conspiracies existed in this case was a question of fact for the jury to determine, and, therefore, the trial court violated his state and federal constitutional rights to a trial by jury and due process when that court refused his request to instruct the jury to "determine whether a single or multiple conspiracies had been proven, and to agree unanimously as to which conspiracy or conspiracies each defendant participated in." We disagree.
>
> . . . "'The crime of conspiracy is defined in the Penal Code as "two or more persons conspir[ing]" "[t]o commit any crime," together with proof of the commission of an overt act "by one or more of the parties to such an agreement" in furtherance thereof. "Conspiracy is a 'specific intent' crime. . . . The specific intent required divides logically into two elements: (a) the intent to agree, or conspire, and (b) the intent to commit the offense which is the object of the conspiracy . . . . To sustain a conviction for conspiracy to commit a particular offense, the prosecution must show not only that the conspirators intended to agree *but also that they intended to commit the elements of that offense*."'"

> In a conspiracy, "[t]he gist of the offense is the unlawful agreement between the conspirators to do an act contrary to law, accompanied by an overt act to at least start to carry the conspiracy into effect." . . . "'[O]ne agreement gives rise to only a single offense, despite any multiplicity of objects.'"
>
> In *Braverman v. United States* (1942) 317 U.S. 49, 53–54 (*Braverman*), where the defendants were charged with the illegal manufacture, transportation and distribution of liquor, and each count charged a conspiracy to violate a different penal statute, and where it was conceded that the different violations were all pursuant to a single overall agreement, the United States Supreme Court concluded that there was only one conspiracy, reasoning: "The gist of the crime of conspiracy as defined by the statute is the agreement or confederation of the conspirators to commit one or more unlawful acts 'where one or more of such parties do any act to effect the object of the conspiracy.' The overt act, without proof of which a charge of conspiracy cannot be submitted to the jury, may be that of only a single one of the conspirators and need not be itself a crime. But it is unimportant, for present purposes, whether we regard the overt act as a part of the crime which the statute defines and makes punishable, or as something apart from it, either an indispensable mode of corroborating the existence of the conspiracy or a device for affording a locus poenitentiae. [¶] For when a single agreement to commit one or more substantive crimes is evidenced by an overt act, as the statute requires, the precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects. Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one. [¶] The allegation in a single count of a conspiracy to commit several crimes is not duplicitous, for 'The conspiracy is the crime, and that is one, however diverse its objects.' A conspiracy is not the commission of the crime which it contemplates, and neither violates nor 'arises under' the statute whose violation is its object. Since the single continuing agreement, which is the conspiracy here, thus embraces its criminal objects, it differs from successive acts which violate a single penal statute and from a single act which violates two statutes. The single agreement is the prohibited conspiracy, and however diverse its objects it violates but a single statute . . . . For such a violation, only the single penalty prescribed by the statute can be imposed."
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> Here, the prosecution charged [Petitioner] with only one count of conspiracy. Assuming that more conspiracy counts could have been charged under the facts, the decision to charge [Petitioner] with only one conspiracy count was a prosecutorial charging discretion that we do not review. The exercise of that discretion involves questions of prosecutorial policies and judgment, not questions of fact for the jury to determine.

Moreover, we fail to see how charging [Petitioner] with one count of conspiracy, instead of multiple counts, could prejudice [Petitioner]. Any error would therefore be harmless.

Furthermore, assuming there were multiple conspiracies, we do not see how the existence of the uncharged conspiracies can result in the reversal of a guilty finding in the one conspiracy that was charged. If the evidence submitted to the jury supports the guilty finding on the charged conspiracy, the fact that the same evidence might also have supported other conspiracies, which were not charged, is of no consequence to the issue of innocence or guilt on the charged conspiracy.

In fact, the record evidence points only to one conspiracy—the agreement to establish the [Nuestra Familia] as a criminal gang to commit murder, robbery, burglary, extortion, and drug trafficking, among other crimes. Within that umbrella conspiracy were sub-conspiracies to commit specific crimes. However, the commission of the specific crimes, and the drawing up of plans required to commit them, were all in pursuance of the overriding purpose of the NF, which was to establish power through the use of crime, force, and fear, and to use that power to further strengthen and perpetuate itself by killing its enemies, raising money for the gang, and instilling obedience and discipline among its members by killing members who break its rules. Thus, Rosas was killed because he had "snitched on Pablo Pena, Panther." The decision to kill Rosas, being one in furtherance of the overriding purpose of the conspiracy, was part of the overall conspiracy, and hence cannot be the basis for filing a separate charge of conspiracy.

It has been held that the overall scheme need not be complete in all its aspects at the time it is formed. "A conspiracy is not necessarily a single event which unalterably takes place at a particular point in time when the participants reach a formal agreement; it may be flexible, occurring over a period of time and changing in response to changed circumstances." "The general test is whether there was 'one overall agreement' to perform various functions to achieve the objectives of the conspiracy. Performance of separate crimes or separate acts in furtherance of a conspiracy is not inconsistent with a 'single overall agreement.' The general test also comprehends the existence of subgroups or subagreements."

Because the Rosas murder did not provide evidence of a conspiracy separate from the overriding [Nuestra Familia] conspiracy, it did not support [Petitioner's] request for multiple conspiracies instruction. A trial court is required to instruct the jury to determine whether a single or multiple conspiracies exist only when there is evidence to support alternative findings.

In *Zemek*, the Ninth Circuit applied a four-factor analysis to determine whether the crimes were committed pursuant to an overall scheme. These factors are: (1) the nature of the scheme; (2) the identity of the participants; (3) the quality,

frequency, and duration of each conspirator's transactions; and (4) the commonality of times and goals.

We are not pointed to any California case adopting the *Zemek* factors, nor has our own research disclosed such a case. Nonetheless, even applying the *Zemek* factors, as [Petitioner] suggests we do, we find in the record no convincing evidence to support [Petitioner's] claim of multiple conspiracies.

First, on the nature of the scheme, [Nuestra Familia] was organized primarily as a prison gang. However, it also functioned on the streets, engaging in various criminal activities. [Nuestra Familia]'s basic purpose was to make money through crime for its members in and out of prison. [Nuestra Familia] members pledge allegiance to act in concert and to commit crimes, including murder, for the gang. [Nuestra Familia] has a written constitution, and its rules require the members to cover up each other's crimes. The only way to get out of the gang is to die, be killed, or be a dropout/snitch. [Nuestra Familia]'s rule is "blood in, blood out," which means that one becomes a member of [Nuestra Familia] by spilling blood, preferably by killing, and leaves the gang by being killed as a coward, traitor, or deserter. A member may be killed by the gang for refusal to follow a superior's orders, or for failure to attend meetings.

On the identity of participants, members participate in whatever criminal activities their superiors order them to do. There is common overlapping of crime assignments.

On the quality of the frequency and duration of a conspirator's transactions, the members are committed to each other in a continuing relationship forged by the bond of "blood in, blood out." NF's written constitution provides for a ranking system where those in higher ranks issue orders to those in lower ranks, and where the penalty for disobeying the orders of a superior is death.

On the commonality of time and goals, the time period for the conspiracy in this case was two and a half years. The goals of the gang, which included making money for its members in and out of prison through criminal activities, such as murder, robbery, and drug trafficking, were shared by all the members.

The four *Zemek* factors to distinguish a single conspiracy from multiple conspiracies all point to a single conspiracy in this case.

We conclude the trial court's instructions were consistent with the law on conspiracy, which is that a single agreement to commit a number of crimes is only one conspiracy, regardless of the number of crimes sought to be committed, or that are committed, under that conspiracy.

. . .

> We conclude the trial court did not err in failing to instruct the jury to determine whether one or multiple conspiracies existed in this case.

Resp. Ex. 1 at 40–49 (some alterations in original) (citations omitted).

The constitutional basis for Petitioner's claim is unclear. Petitioner asserts that the trial court should have directed the jury to decide whether one conspiracy or multiple conspiracies existed. He points to the U.S. Supreme Court's decision in In re Winship, which holds that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. 358, 364 (1970). The Court fails to see how that holding is implicated in Petitioner's case. As the California Court of Appeal noted, the prosecution charged Petitioner with only one count of conspiracy. Such charging decisions generally are not reviewable. United States v. Armstrong, 517 U.S. 456, 464 (1996). Because Petitioner was charged with only one count of conspiracy and the prosecution's theory of the case was that there was a single conspiracy, the jury did not need to decide whether there were multiple conspiracies. Instead, the jury was asked to determine whether the prosecution had established beyond a reasonable doubt the elements of a single conspiracy, and the jury returned a verdict that the prosecution met its burden. Thus, the jury found all facts necessary to constitute the crime of conspiracy under the applicable standard.

More broadly, Petitioner seems to contest the California Court of Appeal's holding that the facts of Petitioner's case qualify as a single conspiracy. Pet. at 18–20. But Petitioner does not explain how that challenge presents a constitutional issue. Although the Constitution requires that each necessary element of the offense be proven beyond a reasonable doubt, "the state legislature's definition of the elements of the offense is usually dispositive." McMillan v. Pennsylvania, 477 U.S. 79, 85 (1986). Here, the Court of Appeal interpreted the California crime of conspiracy to encompass an agreement to commit multiple object offenses. Based on that understanding of state law, Petitioner was not entitled to have the jury instructed in the manner he asserted. Finally, Petitioner cannot override the Court of Appeal's state-law decision by asking

this Court to apply the non-constitutional methodologies for distinguishing between conspiracies used by the Supreme Court in Kotteakos v. United States, 328 U.S. 750, 754–55 (1946), or the Ninth Circuit in United States v. Zemek, 634 F.2d 1159, 1167–68 (9th Cir. 1980). Petitioner's challenge to the conspiracy instruction fails, and he is not entitled to habeas relief on this claim.

6. Failure to provide unanimity instruction

Petitioner's sixth claim is that the trial court erred when it failed to instruct the jury to unanimously agree on the facts underlying the conspiracy. Pet. at 20–22. Without such a unanimity instruction, Petitioner contends, it is "impossible to determine whether the jury unanimously agreed as to whom [Petitioner] conspired to murder." Pet. at 21. Petitioner argues that his Sixth Amendment right to trial by jury and his Fourteenth Amendment right to due process were violated because the jury may not have unanimously agreed that Petitioner committed each element of the underlying conspiracy charge. Pet. at 21.

The California Court of Appeal rejected Petitioner's claim, explaining:

> [Petitioner] contends he was deprived of his Sixth and Fourteenth Amendment rights to a jury trial and due process by the trial court's refusal to instruct the jury to unanimously agree on the facts underlying the elements of the conspiracy, an error that is reversible because it is impossible to determine whether the jury unanimously agreed as to whom [Petitioner] conspired to murder. We disagree.
>
> . . .
>
> Because the agreement is the conspiracy, the diversity of the crimes that may be the object of the agreement should be of little, if any, consequence. Proof that the agreement has crime as its object should be enough. So long as there is unanimity that crime was the object of the agreement, conspiracy is established regardless of whether some jurors believe that crime to be murder and others believe that crime to be something else. "A requirement of jury unanimity typically applies to acts that could have been charged as separate offenses." . . . "[I]f only one criminal offense could exist as a result of the commission of various acts, the jury need not agree on which particular act (or legal theory) a criminal conviction is based, provided the jurors unanimously agree that all elements of the criminal offense are proved beyond a reasonable doubt."
>
> . . . "It matters not that jurors may disagree over the theory of the crime, for example, whether the situation involves felony murder or premeditated murder.

> Nor does it matter that they disagree on the theory of participation, for example, whether there was direct participation or aiding and abetting or coconspiracy. Nor does it matter that they disagree about the facts proving any of these theories. If each juror concludes, based on legally applicable theories supported by substantial evidence, that the defendant is guilty of the charged offense, the defendant is properly found guilty even if the jurors disagree about the particular theories or facts."
>
> . . . "In California it is unnecessary jurors unanimously agree on the theory of criminal culpability supporting their unanimous conclusion of guilt . . . . [¶] . . . [¶] . . . [W]here there is a single offense and a single charge, it is the task of each juror to conclude, based perhaps on very different theories, whether the defendant is guilty or not guilty. It is simply of no consequence that some jurors believe the defendant is guilty based on one theory while others believe he is guilty on another even when the theories may be based on very different and even contradictory conclusions concerning, for example, the defendant's basic intent in committing the crime."
>
> [T]he California Supreme Court explained: "It is settled that as long as each juror is convinced beyond a reasonable doubt that defendant is guilty of murder as that offense is defined by statute, it need not decide unanimously by which theory he is guilty. More specifically, the jury need not decide unanimously whether defendant was guilty as the aider and abettor or as the direct perpetrator. This rule of state law passes federal constitutional muster. [¶] . . . [¶] Not only is there no unanimity requirement as to the theory of guilt, the individual jurors themselves need not choose among the theories, so long as each is convinced of guilt. Sometimes, as probably occurred here, the jury simply cannot decide beyond a reasonable doubt exactly who did what. There may be a reasonable doubt that the defendant was the direct perpetrator, and a similar doubt that he was the aider and abettor, but no such doubt that he was one or the other."
>
> . . . "In analyzing the unanimity question in a robbery case, one Court of Appeal used this example. '"Assume a robbery with two masked participants in a store, one as the gunman and one as the lookout. If one witness makes a voice identification of the defendant as the gunman who demanded money, but other evidence, such as a fingerprint, suggests the defendant was actually holding the door open as lookout, the jury would be faced with the same theories presented in this case: find the defendant was the gunman and therefore a direct perpetrator, or find he was at the door and therefore an aider and abettor. Either way he would be guilty of robbery." If 12 jurors must agree on the role played by the defendant, the defendant may go free, even if the jurors all agree defendant committed the crime. That result is absurd.' Equally absurd would be to let the defendant go free because each individual juror had a reasonable doubt as to his exact role."

> [T]he California Supreme Court had already observed: "If [defendant] intended that only possession of the property should pass at the time of the sale, defendant was guilty of larceny by trick or device, but if [defendant] intended that title should pass, defendant was guilty of obtaining property by false pretenses. Irrespective of [defendant's] intent, however, defendant could be found guilty of theft by one means or another, and since by the verdict the jury determined that he did fraudulently appropriate the property, it is immaterial whether or not they agreed as to the technical pigeonhole into which the theft fell."
>
> Here, [Petitioner] was convicted of one conspiracy. The indictment described that conspiracy as a conspiracy to commit various crimes. Because any one of the crimes that was the object of the conspiracy was sufficient to establish the conspiracy, there were multiple theories upon which the prosecution could proceed. The existence of such multiple theories precluded a unanimity instruction. A unanimity instruction is inappropriate where multiple theories may provide the basis for a guilty verdict on one discrete criminal event.
>
> . . .
>
> Here, the specific crimes that constitute the object of the conspiracy are not elements of the conspiracy. Rather, they are the means by which the purpose of the conspiracy was to be achieved. Accordingly, the . . . requirement of jury unanimity does not apply to them.
>
> Recently, . . . the California Supreme Court settled the question of "whether the jury must unanimously agree on a specific overt act," by holding that "the jury need not agree on a specific overt act as long as it unanimously finds beyond a reasonable doubt that some conspirator committed an overt act in furtherance of the conspiracy."
>
> We conclude the trial court did not err when it refused to instruct the jury that it must unanimously decide whom, if anyone, [Petitioner] conspired to murder.
>
> In any event, any error was invited. The record reflects that the prosecutor informed the court that it had prepared verdict forms that "sought to identify the targets for the conspiracy to commit murder," adding: "We still think there is an umbrella conspiracy and it's pretty obvious that there is. The [Nuestra Familia] is a group and they get together and they do all of these nefarious things. That's the object. But when it comes down to the particular subject matter of who they're planning to murder, that's why we put in the specific subjects of that particular object, object crime, otherwise, we think that we're in trouble on appeal." The attorney for codefendant Lopez argued to the court that the jury should only have to specify which of the object crimes a defendant conspired to commit, not the specific victim of that object crime. The prosecutor repeated that he wished the verdict form to specify whom, if anyone, a defendant conspired to kill.

> The next day, counsel for Lopez objected to the prosecutor's proposed verdict, arguing that it was inconsistent to require specification for the target crime of murder and not for the other target crimes, which had more than one victim. [Petitioner] joined Lopez's objection. The court, which had earlier agreed with the prosecution on what the verdict form should ask the jury to indicate, reversed itself and sustained [Petitioner's] and Lopez's objection, stating: "After reconsidering, I've come to the conclusion I was wrong. And it's my opinion that the jury need only be unanimous about the target crime, that they don't have to unanimously agree as to which event, nor does that have to be reflected in the jury verdict form, whether it be which murder or which robbery or which distribution of controlled substances."
>
> Any error was therefore invited; consequently, [Petitioner] cannot complain.
>
> Any error was also harmless. There is a split of authority on the proper standard for reviewing prejudice when the trial court fails to give a unanimity instruction. Some cases hold that the prejudice must be deemed harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, 24. Other cases hold that the test is as enunciated in *People v. Watson* (1956) 299 P.2d 243, which is whether "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error."
>
> We think *Watson* provides the correct standard on the issue. That is because the requirement for jury unanimity in a criminal prosecution is a state constitutional requirement. The United States Supreme Court "has never held jury unanimity to be a requisite of due process of law. Indeed, the Court has more than once expressly said that '[i]n criminal cases due process of law is not denied by a state law . . . which dispenses with the necessity of . . . unanimity in the verdict.'" . . . There being no right to a unanimous verdict under the United States Constitution, the question of whether [Petitioner] was entitled to a unanimity instruction is a state, not a federal, issue.
>
> In any event, the jury found [Petitioner] guilty of the murder of Rosas. On the record facts, which show that [Petitioner's] participation in the murder of Rosas was in authorizing the murder, and there being no evidence in the record that [Petitioner] actually participated in the murder, or, being present, aided and abetted in the commission thereof, the guilty verdict on [Petitioner] for the murder of Rosas could only have been by reason of the jury unanimously finding that [Petitioner] had conspired to murder Rosas. Because of this implicit unanimous finding of conspiracy, it is not reasonably probable that [Petitioner] would have obtained a more favorable verdict had the unanimity instruction in question been given. For the same reason, any error was harmless even if the standard applied were the *Chapman* standard of harmless error beyond a reasonable doubt.

Resp. Ex. 1 at 49–57 (some alterations in original) (citations omitted).

It is axiomatic that due process and the right to trial by jury "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." United States v. Gaudin, 515 U.S. 506, 510 (1995); Patterson v. New York, 432 U.S. 197, 204 (1977). Although state criminal defendants have no federal right to a unanimous jury verdict (at least in noncapital cases), Johnson v. Louisiana, 406 U.S. 356, 359 (1972), the California Constitution requires jury unanimity in a criminal prosecution, Cal. Const. art. I, § 16. At bottom, Petitioner here does not challenge jury unanimity, but instead the California Court of Appeal's interpretation of California conspiracy law. On this point, the Supreme Court has instructed that jurors are not "required to agree upon a single means of commission" of a crime and that federal courts generally may not "substitute [their] own interpretations of state statutes for those of a State's courts." Schad v. Arizona, 501 U.S. 624, 631, 636 (1991) (plurality opinion).

Here, the California Court of Appeal fully detailed why the jury did not need to agree on whom Petitioner conspired to murder. Specifically, the Court of Appeal explained that "the specific crimes that constitute the object of the conspiracy are not elements of the conspiracy." Petitioner cites to the California Supreme Court's holding that "[a] requirement of jury unanimity typically applies to acts that could have been charged as separate offenses." People v. Beardslee, 806 P.2d 1311, 1323 (Cal. 1991). However, the Court of Appeal confronted Beardslee and described why, on the facts of Petitioner's case, the jury was properly instructed. Indeed, the California Court of Appeal has previously recognized that "the [unanimity] instruction as to a single act need not be given where the acts proved are just alternate ways of proving a necessary element of the *same offense*." People v. Mitchell, 232 Cal. Rptr. 438, 441 (Ct. App. 1986) (internal quotation marks and citation omitted). As Petitioner acknowledges in his supplemental points in support of traverse, his argument here overlaps with his argument that the trial court was required to instruct on multiple conspiracies, Supp. Traverse 16, an argument which the Court has addressed above.

Moreover, the California Court of Appeal rejected Petitioner's argument on another legitimate basis, which Petitioner does not challenge here. Specifically, the Court of Appeal concluded that any error was invited by Petitioner. Resp. Ex. 1 at 55. Petitioner could overcome this failure to comply with California's procedural rule only by demonstrating cause and prejudice or a fundamental miscarriage of justice, Coleman v. Thompson, 501 U.S. 722, 750 (1991), neither of which he has tried to show. Accordingly, Petitioner is not entitled to habeas relief on this claim.

7. Notice of charges

Petitioner's seventh claim is that the prosecution did not reveal until well after the start of trial that it was relying on "overt acts alleging crimes against Alfonso Urango and James Esparza." Pet. at 23. According to Petitioner, the prosecution's delay deprived him of adequate notice of the charges against him, in violation of the Sixth Amendment and his Fourteenth Amendment right to due process. Pet. at 23.

The California Court of Appeal rejected Petitioner's claim, explaining:

> [Petitioner] contends he was deprived of his Sixth and Fourteenth Amendment rights to due process and notice of the allegations that he conspired to murder or assault both Urango and Esparza, where he did not learn of these allegations until four months into trial. We disagree.
>
> At the conclusion of the trial, the prosecution proposed a jury verdict form listing the conspiracy's potential victims. The list included Urango and Esparza, whose names did not appear in the indictment as being involved in the alleged overt acts. [Petitioner] objected to any reference to a conspiracy to murder Urango and Esparza, arguing that [Petitioner] did not have notice of those charges because there was no grand jury testimony given and no overt acts alleged that [Petitioner] had conspired to kill either Urango or Esparza, and that the only evidence connecting [Petitioner] to the Urango and Esparza incidents came up during Salazar's trial testimony. [Petitioner] argues the inclusion of Urango and Esparza in the prosecutor's verdict form violated [Petitioner's] constitutional right to be informed of the nature of the charges against him.
>
> In our discussion on the requirement of jury unanimity, we concluded that the target crimes, that is specific crimes that constitute the object of the conspiracy, are not elements of the conspiracy; rather, they are only the means by which the

> purpose of the conspiracy was to be achieved. Because the Urango/Esparza incidents were not an element of the charged conspiracy, the prosecutor's reference added nothing to what the jury needed to reach a finding of conspiracy. The outcome would have been the same.
>
> Consequently, any error was harmless, regardless of whether the standard of review applied is . . . harmless error beyond a reasonable doubt, or . . . reasonable probability of a more favorable outcome.

Resp. Ex. 1 at 57–58.

The Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation." U.S. Const. amend. VI. Similarly, as a matter of due process, it is "clearly established . . . that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts." Cole v. Arkansas, 333 U.S. 196, 201 (1948); In re Oliver, 333 U.S. 257, 273 (1948) ("A person's right to reasonable notice of a charge against him . . . [is] basic in our system of jurisprudence . . . .").

Here, the California Court of Appeal did not unreasonably apply these broad principles in deciding that Petitioner had adequate notice of the nature and charges against him. In many ways, Petitioner's case mimics Lopez v. Smith, 135 S. Ct. 1 (2014) (per curiam), where the U.S. Supreme Court found habeas relief unwarranted. In that case, the prosecution charged the defendant with murder, a charge which encompassed both principal and aider-and-abettor liability, but focused at trial on the defendant's liability as a principal. Id. at 2. At the close of evidence, the prosecution requested an aiding-and-abetting instruction, which the trial court gave. Id. The Ninth Circuit granted habeas relief, concluding that the defendant's "Sixth Amendment and due process right to notice had been violated because . . . the prosecution (until it requested the aiding-and-abetting jury instruction) had tried the case only on the [principal liability] theory." Id. at 3. The U.S. Supreme Court reversed. The Court reasoned that "the general proposition that a defendant must have adequate notice of the charges against him" was "too abstract to establish clearly the specific rule [the defendant] need[ed]." Id. at 4.

The same is true here. Petitioner does not dispute, nor could he, that he "was on notice that he was charged with conspiracy to commit murder and assault with a deadly weapon by the omnibus conspiracy count of the indictment." Pet. at 22–23. Rather, he contends that he did not receive notice because the indictment and grand jury proceedings did not mention as an overt act anything relating to the attempts to kill Urango and Esparza. Pet. at 23. Petitioner cites no Supreme Court authority requiring such specificity. As the California Court of Appeal noted, the specific crimes that constitute the object of the conspiracy "are not elements of the conspiracy" but "only the means by which the purpose of the conspiracy was to be achieved." Resp. Ex. 1 at 57. In these circumstances, the Court of Appeal could reasonably conclude that failing to include information specific to Urango and Esparza did not undermine Petitioner's notice of the conspiracy charge. Moreover, in at least one respect, this case is less egregious than Lopez: the prosecution here did not simply request an instruction at the close of trial; rather, the prosecution discussed the Urango and Esparza incidents in its opening statement and introduced evidence during its case-in-chief. On those facts, the California Court of Appeal reasonably determined that Petitioner had "notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge." Cole, 333 U.S. at 201.

In Lopez, the U.S. Supreme Court also distinguished the exact authorities that Petitioner relies on here. First, the Court explained that the decision in Lankford v. Idaho, 500 U.S. 110 (1991), "addressed whether a defendant had adequate notice of the possibility of imposition of the death penalty—a far different question from whether respondent had adequate notice of the particular theory of liability." Lopez, 135 S. Ct. at 4. The Court further differentiated Lankford on the ground that "the trial court itself made specific statements that encouraged the defendant to believe that the death penalty was off the table." Id. Those grounds apply with equal force in the instant case. Second, the Court stated that the Ninth Circuit decision in Sheppard v. Rees, 909 F.2d 1234 (9th Cir. 1989), cannot form the basis for federal habeas relief because circuit precedent may not be used to "refine or sharpen a general principle of Supreme Court jurisprudence into a

specific legal rule that [the] Court has not announced." Lopez, 135 S. Ct. at 4 (quoting Marshall, 569 U.S. at 64). The Ninth Circuit's decision in Sheppard does not directly address the issue presented in this case. See id. Therefore, for essentially the same reasons stated in Lopez, Petitioner is not entitled to habeas relief on this claim.

8. Vagueness

Petitioner's eighth claim is that his conviction for conspiracy to commit murder is unconstitutionally vague and generic. Pet. at 24–25. Specifically, he argues that because "there is no way of saying when he agreed to kill, with whom he agreed, how he agreed, or even whom he agreed to kill," it cannot be discerned whether "the jury relied on any specific illegal conduct." Pet. at 24.

The California Court of Appeal rejected Petitioner's claim, explaining:

> [Petitioner] contends his conviction for conspiracy to commit murder violates state and federal due process guarantees because a conspiracy to kill one of various persons without agreement upon who was to be killed is unconstitutionally vague and generic. The contention is without merit.
>
> We have already determined that the trial court was not required to instruct the jury that it had to agree unanimously whom [Petitioner] conspired to kill. Such determination disposes of [Petitioner's] present contention, as well.
>
> [Petitioner's] reliance on *Suniga v. Bunnell* (9th Cir. 1993) 998 F.2d 664, is misplaced. Due process was implicated in *Suniga* because there was in that case one theory of liability upon which the jury was instructed that did not exist in California law. We do not have such a situation here.
>
> In any event, any error was harmless because, as discussed, by finding [Petitioner] guilty of the murder of Rosas on the record facts, the jury had also to find unanimously that [Petitioner] had conspired to murder Rosas.

Resp. Ex. 1 at 58.

As noted above, in at least some circumstances, a state may constitutionally submit multiple theories of criminal liability to a jury without requiring unanimity on any one of them. Schad, 501 U.S. at 631 (plurality opinion). States do not have free rein to define different courses

of conduct as alternative means of committing a single offense, however. Id. at 632. Rather, the Due Process Clause mandates that "no person may be punished criminally save upon proof of some specific illegal conduct." Id. at 633. For example, a state may not "convict anyone under a charge of 'Crime' so generic that any combination of jury findings of embezzlement, reckless driving, murder, burglary, tax evasion, or littering, for example, would suffice for conviction." Id.

The California Court of Appeal reasonably concluded that Petitioner's conviction stayed within these constitutional bounds. Petitioner repeats his argument that "there is no way of saying when he agreed to kill, with whom he agreed, how he agreed, or even whom he agreed to kill." Pet. at 24. The Court of Appeal again explained that Petitioner's conviction was based on a specific theory of criminal conduct under the non-generic crime of conspiracy, which does not require the jury to be unanimous on whom Petitioner conspired to kill. Resp. Ex. 1 at 58. The instant case is also materially different than Petitioner's cited authority, Suniga v. Bunnell, 998 F.2d 664 (9th Cir. 1993). In that case, unlike here, due process was implicated because the defendant "could [have] be[en] found guilty of murder on a non-existent legal theory." Id. at 669. Thus, even considering Petitioner's Ninth Circuit case, he has not shown entitlement to habeas relief on this claim.

9. Sufficiency of the evidence

Petitioner's ninth claim is that there was insufficient evidence to support his conviction for conspiracy to commit murder. Pet. at 25–27. Again emphasizing that the jury was not asked to identify the target of Petitioner's conspiracy, Petitioner argues that his conviction violates due process because "this Court cannot determine whether or not the jury found him guilty of conspiring to kill a person for whom there is constitutionally sufficient evidence in support of the conviction." Pet. at 25 (capitals omitted).

The California Court of Appeal rejected Petitioner's claim, explaining:

> [Petitioner] contends his conviction for conspiracy to commit murder must be reversed for constitutionally insufficient evidence because this court cannot determine whether or not the jury found him guilty of conspiring to kill a person

> for which conspiracy there is constitutionally sufficient evidence in support of conviction. The contention is without merit.
>
> Again, we have already determined that the jury was correctly instructed that it did not need to agree unanimously on which particular murder [Petitioner] conspired to commit so long as it unanimously agreed that [Petitioner] conspired to commit murder as the object of the conspiracy. The jury subsequently found [Petitioner] guilty of the Rosas murder. The guilty finding on the Rosas murder could have only been reached by a unanimous jury finding that [Petitioner] conspired to kill Rosas. That unanimous conspiracy finding was sufficient to support the guilty finding on the single conspiracy count.
>
> Moreover, where the jury is presented with several factual theories for conviction, some of which are predicated upon insufficient evidence, "the appellate court should affirm the judgment unless a review of the entire record affirmatively demonstrates a reasonable probability that the jury in fact found the defendant guilty solely on the unsupported theory." The Rosas murder conviction eliminates such a probability.

Resp. Ex. 1 at 58–59 (citation omitted).

Evidence is constitutionally sufficient to support a conviction when, "viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979); see also Cavazos v. Smith, 565 U.S. 1, 2 (2011) (per curiam) ("[I]t is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial."). The reviewing court presumes that the trier of fact resolved any factual conflicts in the record in favor of the prosecution and defers to that resolution. Jackson, 443 U.S. at 326. The U.S. Supreme Court has "made clear that [sufficiency-of-the-evidence] claims face a high bar in federal habeas proceedings." Coleman v. Johnson, 566 U.S. 650, 651 (2012) (per curiam).

Here, the California Court of Appeal's determination that sufficient evidence supported Petitioner's conspiracy conviction was not objectively unreasonable. The Court of Appeal explained that because there was no record evidence that Petitioner participated in or was present during the Rosas murder, the jury's determination that Petitioner was guilty of the Rosas murder

necessarily demonstrates that sufficient evidence supports that Petitioner conspired to kill Rosas. Resp. Ex. 1 at 59. Indeed, Petitioner does not challenge the sufficiency of the evidence supporting his murder conviction, which included testimony that, in a three-way telephone conversation, Petitioner approved Rosas's murder and gave Chavez the authority to call the hit and testimony that, in prison, Petitioner admitted to ordering the murder. See, e.g., Resp. Ex. 6, RT 12220. Petitioner suggests that because the Court lacks an explicit indication about the jury's theory, the jury's verdict could have rested on an unsupported ground. Pet. at 26. But Petitioner does not identify any affirmative indication that the jury relied on an inadequate ground, and the Court of Appeal followed well settled state and federal law espousing the general rule that "[w]hen a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, . . . the verdict stands if the evidence is sufficient with respect to any one of the acts charged." Griffin v. United States, 502 U.S. 46, 56–57 (1991) (quoting Turner v. United States, 396 U.S. 398, 420 (1970)); see also People v. Guiton, 847 P.2d 45, 52 (Cal. 1993) ("If the inadequacy of proof is purely factual, of a kind the jury is fully equipped to detect, reversal is not required whenever a valid ground for the verdict remains, absent an affirmative indication in the record that the verdict actually did rest on the inadequate ground."). In any event, Petitioner does not develop an argument that the other grounds that could support his conviction (such as conspiracy to kill Urango and Esparza) are unsupported by substantial evidence.

Petitioner raises two additional points. First, he suggests that his conviction could not rest on a conspiracy to murder Rosas because he received a separate punishment for the murder. Pet. at 25–26. That issue goes to sentencing, not to the sufficiency of the evidence supporting his conviction. The Court analyzes that argument below. Second, Petitioner argues that to the extent his conviction was based on gang membership alone, the conviction violates due process. Specifically, he cites the Ninth Circuit's statement in United States v. Garcia, 151 F.3d 1243, 1246 (9th Cir. 1998), that "evidence of gang membership cannot itself prove that an individual has entered a criminal agreement to attack members of rival gangs." First and foremost, Garcia cannot

serve as the basis for habeas relief because it is not a decision of the Supreme Court and does not purport to hold that the U.S. Supreme Court has "clearly established" the stated rule. See Marshall, 569 U.S. at 64. Moreover, the California Court of Appeal did not insinuate that Petitioner's membership in Nuestra Familia alone was enough to show an agreement to accomplish a specific illegal objective; rather, the Court described the defendants' agreement to commit specific crimes to advance "the overriding purpose of the [Nuestra Familia], which was to establish power through the use of crime, force, and fear, and to use that power to further strengthen and perpetuate itself by killing its enemies, raising money for the gang, and instilling obedience and discipline among its members." Resp. Ex. 1 at 45. Accordingly, Petitioner has not shown entitlement to habeas relief on the basis of insufficiency of the evidence.

10. Failure to modify withdrawal instruction

Petitioner's tenth claim is that the trial court should have modified California Jury Instructions—Criminal ("CALJIC") No. 6.20, which describes how a member of a conspiracy may effectively withdraw from the conspiracy, before giving it to the jury in this case. Pet. at 27. Specifically, he contends that the instruction could be misread to require oral communication for withdrawal, even though the law clearly allows withdrawal by a non-verbal affirmative act. Pet. at 27. He argues that this instructional error interfered with his Sixth Amendment right to present a defense and to trial by jury and violated his due process rights under the Fourteenth Amendment. Pet. at 28.

The California Court of Appeal rejected Petitioner's claim, explaining:

> [Petitioner] contends the trial court violated his state and federal constitutional rights to due process and a fair trial by jury by refusing to give the modified withdrawal instruction that he requested, which was supported by the evidence and which pinpointed the defense theory of the case. The contention is without merit.
>
> [Petitioner] requested the court to give a modified version of CALJIC No. 6.20, reading as follows: "Any member of a conspiracy may withdraw from and cease to be a party to the conspiracy, but [his][her] liability for the acts of [his] [her] co-

> conspirators continues until [he][she] effectively withdraws from the conspiracy. [¶] Withdrawal may be communicated by an affirmative act bringing home the fact of [his][her] withdrawal to [his][her] companions. The affirmative act must be made in time for [his][her] companions to effectively abandon the conspiracy and in a way which would be sufficient to inform a reasonable person of the withdrawal. [¶] In order to effectively withdraw from a conspiracy, there must be an affirmative and bona fide rejection or repudiation of the conspiracy which must be communicated to the other conspirators of whom [he][she] has knowledge. [¶] If a member of a conspiracy has effectively withdrawn from the conspiracy [he][she] is not thereafter liable for any act of the co-conspirators committed subsequent to [his][her] withdrawal from the conspiracy, but [he][she] is not relieved of responsibility for the acts of [his][her] co-conspirators committed while [he] [she] was a member. [¶] If the evidence raises a reasonable doubt as to whether the defendant withdrew from the conspiracy, you must find that [he] [she] did withdraw."
>
> The court refused [Petitioner's] request and gave instead the unmodified version of CALJIC No. 6.20, as follows: "A member of a conspiracy is liable for the acts and declarations of his co-conspirators until he effectively withdraws from the conspiracy or the conspiracy has terminated. [¶] In order to effectively withdraw from a conspiracy, there must be an affirmative and good faith rejection or repudiation of the conspiracy which must be communicated to the other conspirators of whom he has knowledge. [¶] If a member of a conspiracy has effectively withdrawn from the conspiracy he is not thereafter liable for any act of the co-conspirators committed after his withdrawal from the conspiracy, but he is not relieved of responsibility for the acts of his co-conspirators committed while he was a member."
>
> [Petitioner] argues that the requested modification should have been granted because without the requested modification "[t]he instruction given could be and probably was interpreted to require that withdrawal from a conspiracy be by oral communication," adding that "[t]his is not correct—one may withdraw from a conspiracy by an 'affirmative act' as well."
>
> The flaw in the argument is that the unmodified version given by the court did not require, and could not be misinterpreted as requiring, that the withdrawal from the conspiracy had to be orally communicated to the coconspirators. As given, the instruction merely required that there be "an affirmative and good faith rejection or repudiation of the conspiracy which must be communicated to the other conspirators of whom he has knowledge." An "affirmative" act need not be oral. We do not see how the language of [Petitioner's] proposed instruction differed from the unmodified version in this regard since both versions used the word "affirmative," and the word "oral" did not appear in either version.

> Moreover, [Petitioner's] proposed version created more problems than it attempted to solve. For example, [Petitioner's] version used the word "companions" for "coconspirators." "Companions" is a word without a settled legal definition, and one with loose meaning. "Companions" are not necessarily "coconspirators" within the meaning of California's penal statutes. What exactly did [Petitioner] mean by "companions"? [Petitioner's] proposed version did not define the term.
>
> [Petitioner's] proposed modification also provided that "[t]he affirmative act must be made in time for [his][her] companions to effectively abandon the conspiracy and in a way which would be sufficient to inform a *reasonable person* of the withdrawal." The addition of the "reasonable person" standard to the instruction is highly questionable. [Petitioner] has cited no authority requiring the use of such a standard.
>
> We conclude the trial court did not err in rejecting [Petitioner's] proposed modification to CALJIC No. 6.20, and in giving CALJIC No. 6.20 to the jury without modification.

Resp. Ex. 1 at 59–61 (some alterations in original).

Although instructional errors are cognizable in federal habeas corpus, they "generally may not form the basis for federal habeas relief." Gilmore v. Taylor, 508 U.S. 333, 344 (1993). It is not enough that the instruction was incorrect as a matter of state law. Estelle v. McGuire, 502 U.S. 62, 71–72 (1991). Habeas relief is available if "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." Id. at 72 (quoting Cupp v. Naughten, 414 U.S. 141, 147 (1973)). Where the charge as a whole is ambiguous, the question is whether there is a "reasonable likelihood" that the jury misapplied the instruction in a way that violated the defendant's constitutional rights. Estelle, 502 U.S. at 72 (quoting Boyde v. California, 494 U.S. 370, 380 (1990)).

The California Court of Appeal did not unreasonably apply federal law when it concluded that CALJIC No. 6.20 could not be misinterpreted to mean that a defendant can withdraw from a conspiracy only by verbal communication. CALJIC No. 6.20 states: "In order to effectively withdraw from a conspiracy, there must be an affirmative and good faith rejection or repudiation of the conspiracy which must be communicated to the other conspirators of whom he has

knowledge." Under the instruction, the defendant must "communicate[]" an "affirmative" rejection or repudiation to the other known conspirators. But nothing in the instruction specifies or suggests that the defendant must orally communicate the withdrawal; the instruction does not use a word like "verbal" or "oral" at all. Instead, the instruction covers non-verbal "affirmative" acts that "communicate[]" the defendant's withdrawal to his coconspirators. With no identified error of state law in the instruction, it was not unreasonable to conclude that a jury could not have been misled.

Petitioner repeats his argument that two Ninth Circuit cases—Escobar de Bright and Unruh—hold that failure to instruct on the defense's theory is an error of constitutional magnitude. Pet. at 28. For the reasons stated above, this circuit precedent cannot give rise to habeas relief in Petitioner's case. Even if Escobar de Bright and Unruh were held to apply here, those cases do not provide defendants with an unfettered right to the instructions of their choice. Rather, the holdings in those cases are tempered by the established rule that "the refusal to give a requested instruction will not be overturned 'if the charge as a whole adequately covers the theory of the defense.'" United States v. Bradshaw, 690 F.2d 704, 710 (9th Cir. 1982) (quoting United States v. Kaplan, 554 F.2d 958, 968 (9th Cir. 1977)). Once Petitioner's argument that CALJIC No. 6.20 is limited to verbal communications of withdrawal is rejected, it is clear that the instruction is broad enough to encompass Petitioner's theory—namely, that he communicated his withdrawal by failing to follow orders to kill Chavez. Pet. at 27. Petitioner's challenge to the withdrawal instruction fails, and he is not entitled to habeas relief on this claim.

11. Consecutive sentences

Petitioner's eleventh claim relates to the trial court's sentencing of Petitioner to twenty-five years to life for the murder of Rosas and a consecutive twenty-five years to life for the conspiracy to commit murder. Pet. at 28. In particular, Petitioner argues that he should not receive consecutive sentences when the "jury never found him guilty of conspiring to murder any specific person other than Rosas." Pet. at 29. According to Petitioner, the trial court decided facts that

increased the penalty of Petitioner's crime beyond the prescribed statutory maximum, in violation of California law and Petitioner's right to trial by jury and due process. Pet. at 29.

The California Court of Appeal rejected Petitioner's claim, explaining:

> [Petitioner] contends he was improperly sentenced to consecutive terms of 25 years to life for both the Rosas murder conviction and for the conspiracy to commit murder, in violation of section 654. The contention is without merit.
>
> Section 654, subdivision (a), provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."
>
> . . .
>
> With respect to conspiracy, the rule was well summarized . . . as follows: "Because of the prohibition against multiple punishment in section 654, a defendant may not be sentenced 'for conspiracy to commit several crimes and for each of those crimes where the conspiracy had no objective apart from those crimes. If, however, a conspiracy had an objective apart from an offense for which the defendant is punished, he may properly be sentenced for the conspiracy as well as for that offense.' Thus, punishment for both conspiracy and the underlying substantive offense has been held impermissible when the conspiracy contemplated only the act performed in the substantive offense, or when the substantive offenses are the means by which the conspiracy is carried out. Punishment for both conspiracy and substantive offenses has been upheld when the conspiracy has broader or different objectives from the specific substantive offenses."
>
> Here, there is strong evidence that the NF, of which [Petitioner] was a member, conspired to kill not only Rosas, but other persons as well, in addition to the gang's overriding conspiracy discussed [earlier].
>
> We conclude the trial court did not err in not applying section 654, and in sentencing [Petitioner] to consecutive life terms for the Rosas murder and the conspiracy to commit murder.

Resp. Ex. 1 at 66–68 (alterations omitted).

The Sixth Amendment's jury-trial guarantee assigns the determination of certain facts to the jury's exclusive province. Under that guarantee, the U.S. Supreme Court has held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). Thus, the crucial issue is whether "the required finding expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict." Id. at 494.

Here, the California Court of Appeal's conclusion does not run afoul of Apprendi. The jury found Petitioner guilty of murder and found Petitioner guilty of conspiracy to commit murder, assault with a deadly weapon, intimidation of witnesses, and possession of a concealed firearm by a convicted felon. Resp. Ex. 8, CT 1840–43. In undertaking the task of determining whether to run consecutively the separate twenty-five-years-to-life sentences on each count, the trial court did not make a finding that increased Petitioner's punishment beyond the statutory maximum for either the murder conviction or the conspiracy conviction. Apprendi itself is distinguishable precisely because it involved sentencing for a discrete crime, not the aggregate effect of multiple crimes. 530 U.S. at 474. Indeed, Apprendi rooted its rule in the historical tradition of having juries decide factual questions to guard against the tyranny of the state. Id. at 477. The California Court of Appeal could reasonably conclude that that same commitment is not implicated in the decision about whether sentences should run concurrently or consecutively.[4]

Petitioner separately argues that the Court of Appeal misapplied California Penal Code section 654. Pet. at 28. Here, the Court of Appeal fully explained why section 654 was inapplicable: the conspiracy that Petitioner was charged with had a broader objective than the specific substantive offense of murder. Resp. Ex. 1 at 66–67. Even if this Court were concerned

[4] Indeed, although it does not constitute governing law for purposes of Petitioner's habeas petition, the Supreme Court later held that Apprendi does not apply to consecutive-sentencing decisions. See Oregon v. Ice, 555 U.S. 160, 168 (2009).

that an error was committed, it is not the province of a federal habeas court to correct a misapplication of state sentencing law absent some identified constitutional issue. See, e.g., Richmond v. Lewis, 506 U.S. 40, 50 (1992). Accordingly, Petitioner has not shown entitlement to habeas relief on this claim.

12. Shackling

Petitioner's twelfth claim centers on the trial court's decision to have all defendants, including Petitioner, wear shackles during trial. Pet. at 30–36. Petitioner argues that the shackling violated his right to an impartial jury and due process because the trial court's decision was not justified by an essential state interest specific to the trial. Pet. at 35–36. Petitioner further states that the shackling prejudiced him because the shackles were visible to the jury throughout the trial and at least some of the jurors saw the shackles. Pet. at 36. Petitioner did not present this claim in his direct appeal. Rather, he made this claim in a petition for writ of habeas corpus to the California Supreme Court, and his petition was summarily denied on April 30, 2003. Resp. Ex. 3.

Central to the right to a fair trial, guaranteed by the Sixth and Fourteenth Amendments, is the notion that "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." Taylor v. Kentucky, 436 U.S. 478, 485 (1978). At the time of the California Supreme Court's decision, the U.S. Supreme Court defined shackling as "the sort of inherently prejudicial practice that . . . should be permitted only where justified by an essential state interest specific to each trial." Holbrook v. Flynn, 475 U.S. 560, 568–69 (1986). Even binding and gagging a defendant could be constitutionally permissible as a last resort. Illinois v. Allen, 397 U.S. 337, 343–44 (1970). The determination of an essential state interest "turns on the facts of the case." Hedlund v. Ryan, 854 F.3d 557, 568 (9th Cir. 2017).

On the particular facts of this case, the Court concludes that there was a reasonable basis for the California Supreme Court to deny relief. The Court recognizes the seriousness of

shackling and the likelihood that the practice could influence a jury in ways that will not be readily apparent in the record. See Riggins v. Nevada, 504 U.S. 127, 137 (1992) (noting that some consequences "cannot be shown from a trial transcript"). Nevertheless, here, the facts and context reasonably demonstrate that the trial court's decision to shackle Petitioner was justified by an essential state interest specific to Petitioner's trial—namely, security of those in the courtroom.

In particular, Petitioner had decision-making authority as a member of a violent gang, which leveraged contacts inside and outside prison to kill those who opposed the gang. Petitioner (as well as the other defendants) was specifically charged with a count of conspiracy to commit witness intimidation. Resp. Ex. 8, CT 1840. And there had been incidents in the lead-up to trial with respect to certain witnesses. For example, after Mari Reyes testified before the grand jury, she was threatened by one of the Nuestra Familia members, being told that she should "be careful or else . . . [she'd] end up like the rest." Resp. Ex. 14, RT 1920–21. Similarly, one of the jailed Nuestra Familia members stated that "when the indictments do come out, we'll start from the top, the ones that done the most damage, we'll eliminate them first, and we'll go down the line." Resp. Ex. 14, RT 3234. On this record, the California Supreme Court could have reasonably concluded that shackling in this case was "justified by an essential state interest specific to [the] trial." Holbrook, 475 U.S. at 569.

Moreover, the trial court held multiple hearings to resolve particular issues related to the shackling.[5] Notably, Petitioner does not identify any place in the record where either he or one of his codefendants requested to be completely free of shackles. However, multiple requests were

[5] Although the Court focuses on the shackling-specific hearings, the trial court also held multiple hearings about other security concerns. Among other things, the court dealt with issues relating to defendants' housing, security arrangements during attorney–client meetings, and the number of security personnel in the courtroom. See, e.g., Resp. Ex. 15D, RT 93; Resp. Ex. 15B, RT 263–64; Resp. Ex. 6, RT 5–13. The prosecution highlighted security concerns and reiterated that "there [was] substantial evidence to believe that the lives of witnesses are in danger." Resp. Ex. 15D, RT 79. The court often sought to balance such concerns against the defendants' rights to assistance of counsel. See, e.g., Resp. Ex. 15B, RT 263–64 (ordering that "the writing hand of the defendant be free during the attorney client interview" to facilitate communication between the attorneys and their clients).

made for less restrictive alternatives. Even though the requirement to pursue less restrictive means of shackling was not clearly established until 2005, Crittenden v. Ayers, 624 F.3d 943, 971 (9th Cir. 2010), the trial court specifically considered these alternatives and rejected more restrictive options. For example, at a pretrial hearing in August 1994, defense counsel asked that their clients be allowed to have one hand free during court proceedings. Resp. Ex. 15C, RT 1140. The prosecution objected, noting that the grand jury testimony showed that various defendants would pose a safety risk to witnesses. Resp. Ex. 15C, RT 1141. Defense counsel responded that the safety risk of unshackling one hand was minimal because their "clients would still have leg irons on and one hand restrained." Resp. Ex. 15C, RT 1142. The trial court ruled that "the defense request be honored and that one hand be unshackled." Resp. Ex. 15C, RT 1147. The court explained that such unshackling was necessary to avoid the "possible impediment to the right to present a defense and issues involving human dignity." Resp. Ex. 15C, RT 1147.

At another point in pretrial proceedings, the prosecution raised the issue of whether defendants should wear stun belts in court. When the issue first surfaced, Petitioner's counsel noted at a June 1996 hearing that stun belts would be uncomfortable and "very, very obvious to the jury"; the court deferred ruling until the belts arrived. Resp. Ex. 6, RT 17, 20. At a later hearing, Petitioner's counsel voiced concerns about using the stun belts and stated that "[Petitioner] is opposed to the use of the [stun] belt, much prefers the bolt to the floor as we talked about last Monday." Resp. Ex. 6, RT 253. Finally, when the stun belts arrived, the court held another hearing in July 1996. Resp. Ex. 6, RT 448. At that hearing, Petitioner's counsel stated:

> Since the defendants have been shackled to the bolts on the floor, it's allowed freedom of movement. I can communicate with [Petitioner], it's unobtrusive, can't be seen. It's covered, virtually soundproof and he's comfortable with it.
>
> With regard to the [stun] belt that has been demonstrated, I don't think that would provide the same sort of comfort as far as the defendant is concerned and would be more obtrusive. And the chance of accident with the use of that and injury to other persons other than defendants is certainly present. I object to the use of the electric belt.

Resp. Ex. 6, RT 452. The court concluded that though stun belts could be used, "given the duration of [the] trial, . . . and the willingness of all the defendants to agree to be shackled to the ground . . . , [the court would] exercise [its] discretion and direct that the defendants be shackled to the ground as requested." Resp. Ex. 6, RT 458–59. Based on the trial court's thorough weighing of the factors at play, the California Supreme Court had a reasonable basis to deny habeas relief.

Petitioner's responses do not alter this conclusion. Petitioner first contends that the trial judge was required to hold an evidentiary hearing and make explicit findings of an essential state interest. Pet. at 30. But, as noted above, the trial court convened multiple proceedings at which these issues were discussed in detail. In any event, neither Holbrook nor Allen—the two U.S. Supreme Court shackling cases relevant here—clearly avows that trial courts must hold an evidentiary hearing or recite specific factual findings. It was not until the 2005 decision in Deck v. Missouri, 544 U.S. 622, 634 (2005), that the U.S. Supreme Court clarified that shackling requires a case-by-case determination supported by "formal or informal findings." See also id. at 649 (Thomas, J., dissenting) (criticizing the majority's adoption of an "additional requirement of on-the-record findings" by the trial judge). Even then, the Court left open the possibility that there could be "exceptional case[s] where the record itself makes clear that there are indisputably good reasons for shackling." Id. at 635 (majority opinion). Indeed, before Deck was decided, the Ninth Circuit had stated: "[W]e have never held, and we refuse to hold now, that a trial court must conduct a hearing and make findings before ordering that a defendant be shackled." Morgan v. Bunnell, 24 F.3d 49, 52 (9th Cir. 1994) (per curiam) (quoting Jones v. Meyer, 899 F.2d 883, 886 (9th Cir. 1990)). Thus, even if the Court concluded that the trial court's findings and hearings were imperfect, neither was required by clearly established federal law as of the time of the California Supreme Court decision.

Petitioner also cites to statements by the trial judge that Petitioner believes undermines the notion that security concerns necessitated shackling. First, at one of the hearings involving the stun belts, the trial judge stated, in response to a comment from Lopez's attorney that Lopez had

"never been a problem in court and . . . would prefer the shackle," that "[Lopez has] never been a problem in the courtroom. None of the defendants have been a problem in the courtroom." Resp. Ex. 6, RT 13. Then, at the hearing deciding whether to unshackle one of the defendants' hands, the trial judge stated that "there [had] been no evidence presented to [the court] to suggest that there would be an escape from th[e] courtroom . . . [or] that any of the defendants might be violent" and reiterated that "the defendants have never been disruptive and . . . have always been respectful." Resp. Ex. 15C, RT 1147. Placed in their appropriate context, those statements are not as broad as they might appear at first blush. For one thing, the judge's statements came in response to specific requests from the defense lawyers—requests not to use stun belts and requests to unshackle one hand, respectively. For another, all of those statements were made during pretrial proceedings, when the risk of danger to witnesses had not yet manifested. Most importantly, however, the defendants had been shackled during pretrial proceedings, including at the time that the trial judge made the statements. Thus, it is difficult to interpret the trial judge's statements as general observations about the defendants' behavior; it is more reasonable to understand those statements to reflect how the defendants had acted while wearing shackles. In this way, the trial judge's statements do not detract from the reasonable basis upon which the California Supreme Court could have denied relief. Accordingly, Petitioner is not entitled to habeas relief on his shackling claim.

The Court also notes that, on habeas review, Petitioner must show that the error had "substantial and injurious effect or influence in determining the jury's verdict." Hedlund, 854 F.3d at 568 n.7 (quoting Brecht v. Abrahamson, 507 U.S. 619, 623 (1993)). Petitioner cannot clear that bar here. In support of his contention that multiple jurors saw his shackles (but did not see the shackles of the other three defendants), Petition submits only his own notes from trial and his own drawing of the layout of the courtroom. Pet. Ex. 12. Those materials are not evidence and, in any event, do not definitively show what the jury could or did see. Petitioner submits no supporting documentary evidence, such as his own affidavit or an affidavit from one of the jurors.

Additionally, prejudice is diminished because Petitioner's counsel did not ask for Petitioner to be unshackled and did not object to the judge informing the jury that Petitioner was shackled. Resp. at 91. As a general matter, "[a] jury is presumed to follow its instructions." Weeks v. Angelone, 528 U.S. 225, 234 (2000). Here, the court told the jury multiple times not to consider the shackling. At the beginning of the case, the court instructed the jury from a statement prepared by one of the defense attorneys: "The defendants in this case are shackled. The fact that they are shackled is not evidence. You cannot allow that to affect your decision in this case, nor can you speculate as to the reason for the shackling." Resp. Ex. 17, RT 651. The court shortly thereafter instructed that the defendants are presumed innocent. Resp. Ex. 17, RT 652. At the end of the case, the court reminded the jury: "The fact that physical restraints have been placed on the defendants must not be considered by you for any purpose. They are not evidence of guilt, and must not be considered by you as any evidence that any defendant is more likely to be guilty than not guilty." Resp. Ex. 11, CT 755. These curative instructions provide assurance that the jury did not rely on Petitioner's shackling, especially where Petitioner's counsel agreed for the jury to be instructed in this manner.

Further, and finally, the prosecution had strong evidence tending to show Petitioner's guilt. Both Salazar and Chavez testified that Petitioner had approved the murder of Rosas in the three-way phone call; Petitioner's sister-in-law testified that she heard Petitioner's side of the conversation, which included references to Rosas and the instruction to "do what you got to do"; and Shelton testified that Petitioner confessed in prison that he told Salazar and Chavez to deal with Rosas. In light of all of these circumstances, Petitioner has not shown that, even if the trial court erred by ordering shackling, that error had substantial and injurious effect or influence in determining the jury's verdict.

13. Ineffective assistance throughout trial

Petitioner's thirteenth claim is that his attorney provided ineffective assistance at multiple stages of the litigation. Pet. at 37–56. Petitioner presented this argument for the first time in a

habeas petition denied by the California Supreme Court on April 30, 2003. Resp. Ex. 3. Where, as here, an ineffective assistance claim does not accuse an attorney of totally failing to subject the prosecution's case to meaningful adversarial testing, the "specific attorney errors [are] subject to Strickland's performance and prejudice components." Bell v. Cone, 535 U.S. 685, 697–98 (2002). As noted earlier, the performance component asks whether counsel's performance "so undermined the proper functioning of the adversarial process that the [proceedings] cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. As the U.S. Supreme Court has instructed, courts must "apply[] a heavy measure of deference to counsel's judgments." Id. at 691. The prejudice component asks whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

Petitioner's contentions fall into three groups. First, Petitioner challenges his attorney's decision to oppose the severance motion brought by other defendants. Second, Petitioner disagrees with his attorney's handling of certain evidence related to the murder of Rosas. Third, Petitioner argues that his attorney did not adequately pursue evidentiary avenues in opposing the prosecution's motion to vacate Petitioner's plea agreement. The Court analyzes each of these categories in turn.

a. Motion to sever

Petitioner first claims that his attorney's performance with respect to the prosecution's motion to consolidate was deficient. Pet. at 38–46. The Court begins with a brief factual background. The prosecution moved to consolidate two indictments charging twenty-one defendants in total. In one of the indictments, Petitioner was charged with conspiracy to commit various crimes (including murder) in Count One and murder of Rosas in Count Twelve. Resp. Ex. 8, CT 1370–72, 1388–89. Eighteen other defendants were also charged in Count One, and six other defendants were also charged in Count Twelve. Resp. Ex. 8, CT 1370, 1388–89.

Multiple defendants opposed consolidation and filed differing motions to sever. For example, Truejque moved to sever his trial from that of Hernandez and Reveles, Petitioner, and

Count Twelve. Pet. Ex. 2 at 9. Arroyo and Serna moved to sever Hernandez and Reveles, and Arroyo also moved to sever Petitioner. Pet. Ex. 3 at 4–5; Pet. Ex. 4 at 12. The prosecution objected to the severance of Petitioner. Important here, Petitioner's counsel filed a motion opposing the severance of Petitioner. Resp. Ex. 8, CT 1104–07. The motion explained that "if [Petitioner] was charged in the indictment with Count 12 only, as are [Hernandez] and [Reveles], justice would best be served and the court discretion would best be exercised by granting the severance." Resp. Ex. 8, CT 1104. However, because Petitioner was also charged in Count One (along with Truejque, Arroyo, and Serna), the motion argued that Petitioner should not be severed. Resp. Ex. 8, CT 1105–07. The court severed the trial of Hernandez and Reveles but otherwise granted the prosecution's motion to consolidate the indictments. Resp. Ex. 8, CT 1110.

Petitioner asserts that opposing severance and supporting consolidation constituted constitutionally deficient performance on the part of his attorney. Although Petitioner identifies good reasons to think that severance may have been warranted, Petitioner's counsel's motion opposing severance also identifies good reasons to support consolidation. On these facts, there is a reasonable basis to conclude that Petitioner's counsel, in conjunction with his client, made an informed tactical decision that did not wholly undermine the proper functioning of the adversarial process.

As Petitioner's counsel's motion opposing severance explains, Petitioner's case was unlike Hernandez's and Reveles's. Those defendants were charged only in Count Twelve, and none of the remaining defendants were charged in that count. Resp. Ex. 8, CT 1104. Although Petitioner was also charged in Count Twelve, he shared an overlapping charge with the remaining defendants—namely, the conspiracy to commit murder and other crimes in Count One. Resp. Ex. 8, CT 1105. Therefore, trying Petitioner together with the other defendants would produce efficiencies well-recognized and favored under federal and state law. See Zafiro v. United States, 506 U.S. 534, 537 (1993) ("There is a preference in the federal system for joint trials of defendants

who are indicted together."); People v. Ochoa, 966 P.2d 442, 475 (Cal. 1998) ("Because consolidation ordinarily promotes efficiency, the law prefers it.").

Likewise, Petitioner's counsel could reasonably have believed that trying Petitioner with the remaining defendants would be beneficial. Although the other defendants were charged with capital crimes, Petitioner's counsel could have reasonably believed that any prejudice would be overcome by Petitioner seeming less culpable by comparison. Resp. Ex. 6, RT 17627 ("I felt from a tactical standpoint it would be better for [Petitioner] to be tried with the death penalty defendants since he is the least culpable of all, he would be viewed in a better light by the jury . . . ."); see also People v. Balderas, 711 P.2d 480, 492 (Cal. 1985) ("[N]othing in the prior cases suggests that severance is required whenever capital charges are involved."). Petitioner's counsel also highlighted the downfalls of severance: Petitioner could suffer prejudice from being tried with Hernandez and Reveles, who were charged with fewer crimes that had more tangential ties to the gang, and Petitioner could be subjected to multiple full trials on the murder and conspiracy counts, resulting in a possible violation of Petitioner's due process rights. Resp. Ex. 8, CT 1105–06; Resp. Ex. 18, RT 7. In light of these alternatives, Petitioner's counsel could reasonably conclude that consolidation was the preferable course.

The record also suggests that the decision about whether to oppose severance was fully deliberated between Petitioner and his counsel. As a general matter, Petitioner's counsel testified at a hearing that he had "fully informed [Petitioner] and [had] discussed all of the important decisions with regard to this case." Resp. Ex. 6, RT 17626. More specifically, with regard to the motions for severance, Petitioner's counsel stated that he had considered the positives and negatives to each of the various options. Resp. Ex. 6, RT 17627. As Petitioner's counsel described, opposing severance "was a tactical decision that was made and made with [Petitioner's] knowledge." Resp. Ex. 6, RT 17627; see also Resp. Ex. 6, RT 17627–28 ("With regard to . . . refus[ing] to file motion for severance, I indicated . . . that we opposed that, we opposed the motion for severance."). Indeed, in a filing submitted to the court, Petitioner admitted that he had

"agreed not to be severed from th[e] case because [he] was convinced that every defendant made [him] look innocent according to [his attorney]." Resp. Ex. 8, CT 1710. Thus, the record supports that Petitioner and his attorney made an informed decision together about whether to oppose severance. The California Supreme Court could have reasonably determined that Petitioner had failed to establish the performance component of his ineffective assistance claim on the severance issue.

Finally, even if Petitioner had shown deficiency in performance, the California Supreme Court could have reasonably concluded that he had not made the requisite showing of prejudice. Improper joinder does not automatically result in a constitutional violation. United States v. Lane, 474 U.S. 438, 446 n.8 (1986). And there is reason to think that the trial court would not have granted severance even if Petitioner's attorney had not opposed or had affirmatively asked for it. As noted above, California law (as well as federal law) has stated a preference for joint trials. See Ochoa, 966 P.2d at 475; see also Zafiro, 506 U.S. at 537. "The burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried." People v. Bean, 760 P.2d 996, 1007 (Cal. 1988). Here, the prosecution made the same arguments as Petitioner's counsel in its oppositions to the various defendants' severance motions. See Resp. at 97. Given that California law starts with a presumption of trying defendants together when they are jointly charged in at least one count, see Cal. Penal Code § 1098; People v. Ortiz, 583 P.2d 113, 116–17 (Cal. 1978), it makes sense that the trial court would sever Hernandez and Reveles (who were charged only in Count Twelve) but not Petitioner (who was charged in Counts One and Twelve). In these circumstances, the California Supreme Court could reasonably conclude that Petitioner had not shown "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 566 U.S. at 694. Accordingly, Petitioner is not entitled to habeas relief on the ground that his attorney provided ineffective assistance of counsel as to the motion to sever.

b. Rosas murder evidence

Petitioner next contends that he received ineffective assistance because his counsel improperly handled certain evidence related to the Rosas murder. Pet. at 46–49. Specifically, Petitioner argues that his counsel should have elicited particular testimony from three witnesses. Pet. at 46–49. Petitioner cites no U.S. Supreme Court authority requiring counsel to present the particular evidence at issue here. Accordingly, the Court analyzes counsel's conduct with respect to each witness under Strickland.

First, Petitioner asserts that his counsel failed to ask certain questions of Mary Rosas, the cousin of target Elias Rosas. Petitioner submits an investigative report by the Santa Clara Office of the District Attorney in which Mary Rosas states that Raul Reveles sent a message to Elias that he planned to kill Elias because he blamed Elias for a narcotics arrest. Pet. Ex. 9 at 2. Petitioner does not submit a sworn declaration from Mary Rosas or other evidence to confirm that Mary Rosas would have testified under oath to the same effect. Moreover, Petitioner's counsel would not have been able to question Mary Rosas about her statement in court: her statement almost certainly constitutes inadmissible hearsay because it merely reflects second-hand knowledge of what others said. See generally People v. Sanchez, 374 P.3d 320, 326 (Cal. 2016). Thus, Petitioner cannot claim that his counsel acted unreasonably in "fail[ing] to question Mary Rosas regarding Raul Reveles['s] 1990 threats." Pet. at 46.

Second, Petitioner condemns his counsel's failure to question Roland Saldivar about his statement during a police interview. In particular, Petitioner reads Saldivar's statement to assert that "Salazar did not telephone [P]etitioner for any reason the night Elias Rosas was killed as alleged by the prosecution." Pet. at 48. The problem is that Petitioner had admitted to the prosecution, in an interview where Petitioner's attorney was present, that he had received two phone calls from Salazar that night. Resp. Ex. 21, RT 14. Thus, the two stories appeared to be in conflict, and Petitioner's counsel could have reasonably believed that presenting Saldivar's narrative could undermine Petitioner's. Moreover, other facts weakened the import of Saldivar's

statement. Although Saldivar stated that he was present with Salazar when Salazar was talking with Chavez on the phone about Rosas and the decision was made to murder Rosas, his statement does not preclude a three-way conversation with Petitioner, especially when Saldivar acknowledged that he was not allowed to hear much. Pet. Ex. 13. Out of the presence of the jury, Saldivar further testified that he could not remember what Salazar said in the phone call. Resp. Ex. 6, RT 16986. Given the low value of eliciting Saldivar's testimony on this point, combined with Petitioner's counsel's knowledge that Petitioner had stated under oath that he had talked to Salazar on the night of the Rosas murder, Petitioner's counsel could have reasonably concluded that it was best not to press Saldivar and risk harmful testimony.

Third, Petitioner claims that his counsel was ineffective in failing to call Reveles, who allegedly made a statement that Petitioner was innocent of the murder of Rosas. Petitioner's counsel addressed this point at a hearing before the trial court. He explained that "[a]ll Albert Reveles said was that as far as he knew, [Petitioner] had nothing to do with the communications between . . . Chavez and Salazar." Resp. Ex. 6, RT 17737. But, as Petitioner's counsel described, that fact did not necessarily prove anything because Reveles was not in a position to know whether Petitioner was involved or not. Resp. Ex. 6, RT 17737. Thus, in Petitioner's counsel's view, "[Reveles] was no help to . . . [Petitioner] as far as [he] could see." Resp. Ex. 6, RT 17737. Petitioner's counsel also indicated that he had discussed the matter with Petitioner. Resp. Ex. 6, RT 17737. Because Petitioner does not specify the basis for his assertion about Reveles or otherwise submit an affidavit from Reveles, it was reasonable to conclude that Petitioner had not shown that his attorney's performance was constitutionally deficient. See Strickland, 466 U.S. at 686.

Accordingly, there was a reasonable basis for the California Supreme Court to deny Petitioner's claim that his attorney improperly handled the identified evidence related to the Rosas murder.

c. Motion to vacate Petitioner's plea agreement

Finally, Petitioner adds further arguments to those made above about why his attorney provided ineffective assistance with regard to the proceedings on the prosecution's motion to vacate Petitioner's plea agreement. Pet. at 49–53. Specifically, Petitioner challenges his counsel's (1) refusal to secure a copy of the polygraph readout and (2) decision not to call two witnesses to testify that Petitioner wished to correct errors in a March 1993 statement to the prosecution. Pet. at 49–53. The Court analyzes these specific challenges in turn.

Based on the record, the California Supreme Court could have reasonably concluded that the decision not to obtain the polygraph readout was reasonable. It is true that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691. Nevertheless, counsel's conduct is measured "from counsel's perspective at the time." Id. at 689. Although Petitioner cites a 1998 declaration from the polygraph operator that he believed that he had contacted Petitioner's counsel and recommended performing a second polygraph examination, Pet. Ex. 10 at 3, it is not clear that that information was before his counsel at the time of the motion to vacate. In fact, Petitioner's counsel stated in an affidavit that the polygraph operator "did not at any time indicate," in his report or otherwise, "that a second examination of [Petitioner] was necessary or called for in order to render an accurate result." Resp. Ex. 23. Indeed, Petitioner's counsel declared that, if he had received such a suggestion, he would have actively pursued a second polygraph to avoid going to trial. Resp. Ex. 21, RT 71–72; Resp. Ex. 23. On this basis, it would have been reasonable for the California Supreme Court to conclude that Petitioner had not shown that his counsel's actions were outside the range of professional competent assistance.

The record also supports a reasonable conclusion that Petitioner's counsel made a sound judgment not to call two persons associated with the prosecution as witnesses during the proceedings on the motion to vacate. Petitioner claims that his attorney should have put on prosecution investigator Williams and Sergeant Quimet to testify that Petitioner had contacted

them to correct errors in his statement to the prosecution in March 1993. Pet. at 52–53. However, Petitioner suggests that he wished to give further background facts and clarify discrepancies, not that he wished to recant or fully revise his statement. Pet. at 52–53. Indeed, Petitioner does not provide a declaration from Williams or Quimet that details what Petitioner said to them. In these circumstances, Petitioner's counsel's explanation is eminently reasonable: "I didn't call them because I didn't feel what they could contribute was relevant to whether or not there was a conflict, whether or not there was an effort to deceive the prosecution during the course of the giving of those statements." Resp. Ex. 6, RT 17742. Accordingly, there was a reasonable basis for the California Supreme Court to deny Petitioner's claim that his attorney's conduct in the proceedings on the prosecution's motion to vacate Petitioner's plea agreement fell below an objective standard of reasonableness.

In sum, Petitioner has not shown entitlement to habeas relief on his claim for ineffective assistance of counsel.

14. Right to control defense

Petitioner's fourteenth, and last, claim relates to decisions made by his counsel about what evidence to present in defense at trial. Pet. at 57–72. Specifically, Petitioner states that he wished to present evidence, in the form of his testimony and testimony from other witnesses, that he never received the three-way phone call where he allegedly ordered the hit on Rosas. Pet. at 70. Petitioner contends that his Sixth Amendment right to present a defense was infringed. Pet. at 71. Like with the previous two claims, Petitioner did not present this claim in his direct appeal, but instead in a petition for writ of habeas corpus, which was summarily denied by the California Supreme Court on April 30, 2003. Resp. Ex. 3.

Petitioner cites only one U.S. Supreme Court case in support of his arguments, Faretta v. California, 422 U.S. 806 (1975). That case is inapplicable here. There, the U.S. Supreme Court held that "[t]he Sixth Amendment, when naturally read, . . . implies a right of self-representation." Id. at 821. Thus, in the circumstance where a defendant "clearly and unequivocally declared to the

trial judge that he wanted to represent himself and did not want counsel," the court "deprived him of his constitutional right to conduct his own defense" by forcing him "to accept against his will a state-appointed public defender." Id. at 835–36. Here, Petitioner does not contend that he wished to represent himself. Instead, he asserts the right to control what witnesses to call, what questions to ask those witnesses, and what defense to assert. Nothing in Faretta clearly establishes that level of control when a defendant is represented. To the contrary, Faretta indicates that "when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas." Id. at 820. Petitioner does not argue by reference to other U.S. Supreme Court authority that his lawyer was not entitled to make the particular decisions at issue in this case. As the trial court put it, "[i]t's the attorney's job in a case to make tactical decisions and to conduct a defense in a way that the lawyer feels will be beneficial to the client." Resp. Ex. 6, RT 20105.

Certainly, Petitioner's counsel could not make the decision about whether Petitioner should testify. A criminal defendant has the right to testify on his own behalf and retains the right to make the decision whether to testify. Rock v. Arkansas, 483 U.S. 44, 52–53 (1987); Jones v. Barnes, 463 U.S. 745, 751 (1983) (noting that "the accused has the ultimate authority to make certain fundamental decisions regarding the case," including whether to "testify in his or her own behalf"). But the facts definitively show that Petitioner was informed about his right to testify. On July 11, 1997, the trial court held a hearing at the same time that the jury was deliberating to explore Petitioner's grounds for dismissing his attorney. Resp. Ex. 6, RT 20084. At the hearing, Petitioner stated: "I know I have the right to take the stand on my behalf and I know that I have a right not to take the stand." Resp. Ex. 6, RT 20092. His sole objection was that "[he] would have been better off taking the stand like [he] wanted to." Resp. Ex. 6, RT 20092; see also Resp. Ex. 6, RT 20092 ("I think I would have been better to take the stand to defend myself on my behalf."). Petitioner's counsel responded that "[w]e've discussed his testifying from the moment I first interviewed him in the county jail, his right to testify and what the problems were, what the pitfalls

were from his testifying." Resp. Ex. 6, RT 20098. At the end of the hearing, the court denied Petitioner's request and stated that "I do not believe that [your attorney] did not adequately explain to you about the right to testify or not to testify. I am satisfied that you knew exactly what right you had with reference to that." Resp. Ex. 6, RT 20104. Petitioner did not otherwise assert that his attorney prevented him from testifying. Accordingly, Petitioner is not entitled to habeas relief on this claim.

CONCLUSION

After a careful review of the record and pertinent law, the Court concludes that the Petition for a Writ of Habeas Corpus is **DENIED**.

Further, a Certificate of Appealability is **DENIED**. See Rule 11(a) of the Rules Governing Section 2254 Cases. Petitioner has not made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Nor has Petitioner demonstrated that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000). Petitioner may not appeal the denial of a Certificate of Appealability but may seek a certificate from the Court of Appeals under Rule 22 of the Federal Rules of Appellate Procedure. See Rule 11(a) of the Rules Governing Section 2254 Cases.

The clerk shall terminate any pending motions, enter judgment in favor of Respondent, and close the file.

SO ORDERED.

Dated: March 27, 2018

EDWARD J. DAVILA
United States District Judge

United States District Court
Northern District of California

S110307

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re EDDIE M. VARGAS, SR. on Habeas Corpus

Petition for writ of habeas corpus is DENIED.

SUPREME COURT
FILED

APR 30 2003

Frederick K. Ohlrich Clerk

DEPUTY

George

Chief Justice

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CLERK SUPREME COURT

Court of Appeal, Sixth Appellate District - No. H017310
S100648

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

EDWARD VARGAS, Defendant and Appellant.

Petition for review DENIED.

GEORGE, C.J.

Chief Justice

110 Cal.Rptr.2d 210 **Page 1**
91 Cal.App.4th 506, 110 Cal.Rptr.2d 210, 00 Cal. Daily Op. Serv. 6785, 2001 Daily Journal D.A.R. 8253
(Cite as: 91 Cal.App.4th 506, 110 Cal.Rptr.2d 210)

Court of Appeal, Sixth District, California.

The PEOPLE, Plaintiff and Respondent,
v.
Edward VARGAS, Defendant and Appellant.

No. H017310.

Aug. 6, 2001.
As Modified on Denial of Rehearing Sept. 4, 2001.
Review Denied Nov. 14, 2001.

Defendant was convicted in the Superior Court, Santa Clara County, Superior Ct. No. 156285, Kevin J. Murphy, J., of conspiracy to commit 96 overt acts including murder, robbery, and drug offenses, as well as one count of murder, and was sentenced to total prison term of 60 years to life. Defendant appealed. The Court of Appeal, Premo, J., held that: (1) six-month delay between defendant's breach of plea agreement and state's motion to vacate plea agreement did not waive state's right to seek vacation of agreement; (2) limitations on defendant's examination of witnesses were appropriate; (3) conspiracy to commit second-degree murder was not lesser included offense of conspiracy to commit murder; (4) decision to kill one victim was part of overall conspiracy and could not form basis for separate charge of conspiracy; (5) defendant was not entitled to multiple conspiracies instruction; (6) unanimity instruction was not required on conspiracy charge; (7) evidence was sufficient to support conspiracy conviction; (8) defendant was not entitled to modified version of withdrawal instruction; (9) prosecutor's comments during closing argument were fair rebuttal; and (10) consecutive sentences did not violate sentencing statute proscribing multiple punishments for a single act.

Affirmed.

West Headnotes

[1] Criminal Law ⚿273.1(2)
110k273.1(2)
Power of the court to set aside a plea bargain on the ground of breach by a defendant of its terms is beyond question.

[2] Criminal Law ⚿1031(4)
110k1031(4)
Defendant's failure to secure ruling on his argument, in opposition to state's motion to set aside his plea agreement, that setting aside of the agreement was prohibited by laches precluded review of such argument on appeal.

[3] Criminal Law ⚿273.1(2)
110k273.1(2)
Six-month delay between defendant's statement, deemed to be in violation of his obligations under plea agreement, and state's filing of motion to vacate plea agreement did not amount to ratification or acceptance by state of defendant's second statement and did not waive state's right to seek to vacate plea agreement, given complexity of gang-related conspiracy case in connection with which defendant's plea had been entered, where plea agreement implicitly authorized prosecution to move to vacate defendant's plea for breach by defendant of its terms at any time prior to conclusion of trial, and defendant's obligation thereunder was clearly continuing.

[4] Criminal Law ⚿273.1(2)
110k273.1(2)
Bargaining.
Filing of motion to vacate plea agreement based on defendant's breach of his obligations thereunder amounted to exercise of prosecutorial discretion to charge and prosecute defendant, and to conduct prosecution in manner deemed best for effective and efficient administration of law enforcement.

[5] Criminal Law ⚿1167(5)
110k1167(5)
Any impropriety in six-month delay between defendant's statement, deemed to be in violation of his obligations under plea agreement, and state's filing of motion to vacate plea agreement did not prejudice defendant and was harmless error, where defendant's trial did not begin for more than two ears after his plea agreement had been set aside, giving defendant sufficient time to prepare for his defense.

[6] Sentencing and Punishment ⚿1487
350Hk1487
Sentence of 60 years to life given defendant convicted of conspiracy to commit 96 overt acts including murder, robbery, and drug offenses, as well as one count of murder, was not rendered violative of federal constitutional protection against cruel and unusual punishment by fact that he would have served only five years under negotiated plea

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agreement vacated on state's motion upon his breach of its terms. U.S.C.A. Const.Amend. 8.

[7] Criminal Law 641.13(6)

110k641.13(6)

Defendant's unsupported contention that reasonably competent trial counsel would have informed himself of probable outcome of polygraph examination of defendant before stipulating to admissibility of results thereof was insufficient to permit appellate review of defendant's claim of ineffective assistance of counsel, where in absence of any evidence that counsel's agreement to polygraph examination stipulation was not informed decision, counsel was entitled to presumption that his decision was tactical choice. U.S.C.A. Const.Amend. 6.

[8] Criminal Law 338(6)

110k338(6)

Impeaching

Limitation of cross-examination of state's witnesses and refusal to permit direct examination of potential defense witness, in gang-related conspiracy prosecution, regarding an uncharged murder was not abuse of discretion; potential defense witness never testified, evidence with respect to uncharged murder was relevant only to impeachment of state's witness with potential defense witness' contradictory statement concerning uncharged murder, and permitting litigation of uncharged murder would have amounted to mini-trial on uncharged crime, resulting in jury confusion and inordinate consumption of time. West's Ann.Cal.Evid.Code § 352.

[9] Criminal Law 1153(1)

110k1153(1)

Standard of review for a trial court's balancing of the probative value and potential for undue prejudice of proffered evidence is abuse of discretion. West's Ann.Cal.Evid.Code § 352.

[10] Criminal Law 338(1)

110k338(1)

Cross-examination of police witness in gang-related conspiracy and murder prosecution, with respect to status of separate investigation of a co-defendant, was properly precluded as tending to elicit only irrelevant evidence; state's evidence showed that defendant ordered murder because victim could identify a co-defendant as one perpetrator of a robbery, and closure of witness' investigation of the co-defendant did not require conclusion that defendant had no way to know that victim could identify co-defendant. West's Ann.Cal.Evid.Code § 210.

[11] Criminal Law 338(1)

110k338(1)

Trial courts have wide discretion in determining the relevancy of evidence. West's Ann.Cal.Evid.Code § 210.

[12] Indictment and Information 191(.5)

210k191(.5)

Conspiracy to commit second-degree murder was not lesser included offense of conspiracy to commit murder.

[13] Criminal Law 795(2.50)

110k795(2.50)

Instruction on second-degree murder as lesser included offense was not warranted in prosecution for first-degree murder, where evidence demonstrated that defendant acted with premeditation and deliberation in ordering victim's murder and did not demonstrate that defendant had acted with rashness in doing so.

[14] Criminal Law 1134(3)

110k1134(3)

Decision to charge defendant with only one conspiracy count, rather than multiple counts, was prosecutorial charging discretion not subject to appellate review; exercise of that discretion involves questions of prosecutorial policies and judgment, not questions of fact for jury to determine.

[15] Criminal Law 1167(1)

110k1167(1)

Any error in charging defendant with one count of conspiracy to commit 96 overt acts, rather than multiple counts of conspiracy, did not prejudice defendant and was harmless, where existence of uncharged conspiracies would not compel reversal of defendant's conviction; if evidence submitted to jury supported guilty finding on charged conspiracy, fact that the same evidence might also have supported other, uncharged conspiracies, was of no consequence to issue of innocence or guilt on charged conspiracy.

[16] Criminal Law 29(5.5)

110k29(5.5)

Decision to kill murder victim, being one in furtherance of overriding purpose of conspiracy, which was to establish criminal street gang to commit murder, robbery, burglary, extortion, and drug trafficking, was part of overall conspiracy and could not form basis for separate charge of conspiracy.

[17] Conspiracy 48.2(2)

91k48.2(2)

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Multiple conspiracies instruction was not warranted in prosecution for conspiracy to commit murder and related crimes, where murder ordered by defendant did not evince conspiracy separate from overriding conspiracy with which defendant and others were charged, namely, conspiracy to establish criminal street gang to commit murder, robbery, burglary, extortion, and drug trafficking.

[18] Conspiracy ⚿48.2(1)

91k48.2(1)

Trial court is required to instruct the jury to determine whether a single or multiple conspiracies exist only when there is evidence to support alternative findings.

[19] Conspiracy ⚿48.2(2)

91k48.2(2)

Assuming applicability of four-part *Zemek* test to determine whether crimes charged as a conspiracy were committed pursuant to overall scheme, defendant's involvement in murder was not part of conspiracy separate from overall conspiracy, as required to entitle defendant to multiple conspiracies instruction; conspiracy at issue was a criminal street gang, operating both in prison and on the streets, gang members were required to participate in all criminal activities ordered by their superiors, gang membership was constant and could be terminated only by death, time period for conspiracy was two and a half years, and gang's goals, including murder, were shared by all members.

[20] Conspiracy ⚿24(2)

91k24(2)

Single agreement to commit a number of crimes is only one conspiracy, regardless of the number of crimes sought to be committed, or are committed, under that conspiracy.

[21] Criminal Law ⚿872.5

110k872.5

Because an agreement to commit a criminal act or acts is conspiracy, the diversity of the crimes that may be the object of the agreement should be of little, if any, consequence; so long as there is jury unanimity that crime was the object of the agreement, conspiracy is established regardless of whether some jurors believe that crime to be murder and others believe that crime to be something else.

[22] Criminal Law ⚿798(.5)

110k798(.5)

Unanimity instruction was not warranted in prosecution for conspiracy to commit 96 overt acts, where defendant was convicted of one conspiracy, described in indictment as conspiracy to commit various crimes; because any of the crimes forming object of conspiracy was sufficient to establish conspiracy, prosecution could proceed upon multiple theories, precluding unanimity instruction.

[23] Criminal Law ⚿798(.5)

110k798(.5)

Unanimity instruction is inappropriate where multiple theories may provide the basis for a guilty verdict on one discrete criminal event.

[24] Criminal Law ⚿872.5

110k872.5

Jury unanimity requirement does not apply where specific crimes that constitute the object of a conspiracy are not elements of the conspiracy, but rather are the means by which the purpose of the conspiracy is to be achieved.

[25] Criminal Law ⚿1038.2

110k1038.2

Conspiracy defendant waived appellate review of his contention that he was entitled to unanimity instruction, where state originally proposed that such instruction be given, but trial court ultimately declined to do so on basis of objections filed by defendant and a co-defendant.

[26] Criminal Law ⚿1173.2(1)

110k1173.2(1)

Trial court's rejection of unanimity instruction in conspiracy prosecution was subject to review for reasonable probability that result more favorable to appealing party would have been reached in absence of error complained of, where requirement for jury unanimity in a criminal prosecution was state constitutional requirement rather than requisite of due process of law. West's Ann.Cal. Const. Art. 1, § 16.

[27] Criminal Law ⚿798(.5)

110k798(.5)

Question of whether a defendant is entitled to a unanimity instruction is a state, not a federal, issue, there being no right to a unanimous verdict under the United States Constitution. West's Ann.Cal. Const. Art. 1, § 16.

[28] Criminal Law ⚿1173.2(1)

110k1173.2(1)

Any error in trial court's failure to give unanimity instruction in conspiracy prosecution was harmless, where unanimous finding of conspiracy was implicit in jury's unanimous conclusion that defendant was guilty of murder in which his only role had been to authorize murder of victim by others; absent any evidence that defendant actually participated in murder, or, being present, aided and abetted in

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commission thereof, guilty verdict on murder charge could only have been by reason of unanimous finding that defendant conspired to murder victim.

[29] Criminal Law ⚿798.5

110k798.5

Inclusion in jury verdict form, in prosecution for conspiracy involving 96 overt acts including murder, of conspiracy to murder two victims not charged in indictment and not mentioned until four months into trial, did not implicate defendant's constitutional rights to due process and to notice of allegations against him, where specific crimes constituting object of conspiracy were not elements of the conspiracy. U.S.C.A. Const.Amends. 6, 14.

[30] Criminal Law ⚿1175

110k1175

Any error in inclusion in jury verdict form, in prosecution for conspiracy involving 96 overt acts including murder, of conspiracy to murder two victims not charged in indictment and not mentioned until four months into trial was harmless.

[31] Conspiracy ⚿43(6)

91k43(6)

Charge of conspiracy to kill one of various persons, without requirement that there be agreement upon who was to be killed, is not unconstitutionally vague and generic.

[32] Criminal Law ⚿1173.2(1)

110k1173.2(1)

Any error in defendant's conviction for conspiracy to commit murder, without requirement that jury agree unanimously as to which victim defendant conspired to kill, was harmless, where jury convicted defendant of one murder and such conviction implied unanimous finding of conspiracy to murder.

[33] Conspiracy ⚿47(8)

91k47(8)

Evidence was sufficient to support conviction for conspiracy to commit murder, where jury did not need to agree unanimously on which particular murder defendant conspired to commit so long as it unanimously agreed that defendant conspired to commit murder as object of the conspiracy, and jury subsequently found defendant guilty of particular murder; guilty finding as to murder could have only been reached by way of unanimous jury finding that defendant conspired to kill victim, as defendant was not directly involved in victim's murder.

[34] Criminal Law ⚿1175

110k1175

Where the jury is presented with several factual theories for conviction, some of which are predicated upon insufficient evidence, the appellate court should affirm the judgment unless a review of the entire record affirmatively demonstrates a reasonable probability that the jury in fact found the defendant guilty solely on the unsupported theory.

[35] Criminal Law ⚿809

110k809

Conspiracy defendant was not entitled to modified version of withdrawal instruction, stating that there was no requirement that withdrawal from conspiracy be communicated orally to other conspirators, where standard instruction given by the court did not include such requirement, and defendant's proposed modifications created confusion not found in standard instruction. CALJIC 6.20.

[36] Criminal Law ⚿1037.2

110k1037.2

Conspiracy defendant waived appellate review of his contention that prosecutor's closing argument improperly injected issues of gender bias and racial bias, where trial counsel objected to prosecutor's remarks, but did not additionally request admonition that would have cured any harm, and defendant made no showing that claimed harm would not have been cured by appropriate admonition.

[37] Criminal Law ⚿726

110k726

Prosecutor's comments during closing argument in conspiracy prosecution, to effect that certain of defense counsel's comments evinced gender, racial, or age-based bias against her, were fair rebuttal of defense counsel's uncalled-for remarks denigrating prosecutor's intelligence and competence.

[38] Criminal Law ⚿1171.1(4)

110k1171.1(4)

Any error in prosecutor's comments during closing argument in conspiracy prosecution, to effect that certain of defense counsel's comments evinced gender, racial, or age-based bias against her, was not egregious enough to warrant reversal of defendant's conviction, where comments did not render trial fundamentally unfair or involve use of deceptive or reprehensible methods to attempt to persuade either court or jury.

[39] Criminal Law ⚿1171.1(4)

110k1171.1(4)

Any error in prosecutor's comments during closing argument in conspiracy prosecution, to effect that certain of defense counsel's comments evinced gender, racial, or age-based bias against her, did not prejudice defendant and was harmless, where

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prosecutor did not comment on race, or sex, or age, of defendant, but rather on her own race, sex, and age, as they might have affected opposing counsel's, and court's and jury's, regard of her, and comments pertained to how evidence might be unfairly viewed by jury because of defense counsel's claim that prosecutor was unable to understand and analyze evidence correctly.

[40] Criminal Law ⚿1171.1(2.1)
110k1171.1(2.1)

Defendant charged with conspiracy failed to demonstrate that prosecutor's comments during closing argument, alleged by him to constitute misconduct, prejudiced his right to fair trial.

[41] Sentencing and Punishment ⚿559(3)
350Hk559(3)

Imposition of consecutive sentences upon convictions of murder and conspiracy to commit murder did not violate sentencing statute proscribing multiple punishments for a single act, where conspiracy had objectives apart from the murder of which defendant was convicted. West's Ann.Cal.Penal Code § 654(a).

**215 *517 Bill Lockyer, Attorney General, Robert R. Anderson and Ronald A. Bass, Assistant Attorneys General, Stan M. Helfman and John R. Vance, Jr., Deputy Attorneys General, for Plaintiff/Respondent

Kathy M. Chavez, Berkeley, Tara Mulay, for Defendant/Appellant.

PREMO, J.

Defendant Edward Vargas was charged by grand jury indictment with conspiracy to commit murder, robbery, assault with a deadly weapon, arson, burglary, extortion, intimidation of witnesses, terrorist threats, escape, possession of concealable firearm by a convicted felon, *518 and distribution of heroin, cocaine, phencyclidine (PCP), and methamphetamine (count 1), and the murder of Elias Rosas (Pen.Code, § 187; [FN1] count 12). Count 1 alleged 96 overt acts. The indictment further alleged that counts 1 and 12 were committed for the benefit of, at the direction of, and in association with a criminal street gang, with the specific intent to promote, further, and assist in criminal conduct by gang members, within the meaning of section 186.22, subdivision (b)(1).

FN1. Further statutory references are to the Penal Code unless otherwise stated.

The indictment was amended on July 8, 1996, to add the allegation that defendant had suffered two prior felony convictions.

Defendant pleaded not guilty and denied the enhancement allegations.

The jury found defendant guilty on both, and also found true the enhancement allegations.

The court sentenced defendant to a total prison term of 60 years to life, as follows: **216 25 years to life on count 1; a consecutive 25 years to life on count 12; and a consecutive 10-year enhancement for the two prior felony convictions.

We affirm.

FACTS

A. Nuestra Familia

The Nuestra Familia (NF) is a prison gang that was founded in September 1968 by inmates at the California State Prison San Quentin (San Quentin). NF is a "cold-hearted gang" that commits murders, burglaries, extortion, and other crimes, including selling drugs to raise money for its members. Persons who testify against the NF are killed. Since its founding, NF has become "the most organized prison gang" in the California Department of Corrections (CDC). NF has also, since its founding, extended its influence outside of prison walls to the "streets." NF has a written constitution. The governing body of NF is called the "Mesa."

New NF members receive "schooling" on such subjects as how to construct weapons from found material, how to attack an enemy, and how to build the gang outside prison.

To be eligible for NF membership, a prisoner had to be a member of the "Northern Structure" (NS). NF membership is a lifetime commitment. Leaving the NF is, according to its constitution, an offense punishable by death. *519 Of this lifetime commitment, Ronnie Shelton, an NF member who testified for the prosecution, stated: "Blood in blood out is not written literally into the constitution word for word, although between the lines it is definitely

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there, that you come into the organization with blood on your hands, preferably murder, if not, any other criminal acts and, for example, a deserter, traitor or coward who decides to defect and leave the organization, blood out is meaning to kill him."

Shelton further testified that although the constitution provides for an automatic death sentence for a traitor (i.e., "an NF who decides to defect, drop out, of the organization"), in practice, there was discretion. Shelton said he could be "considered a traitor because I have defected and I'm testifying." Asked if his defection meant a death sentence, Shelton testified: "Yes. If they ever had an opportunity to get near me they--pretty sure some would try to kill me, and perhaps maybe some wouldn't. It's not carved in stone to kill, because it's upon the individual if he wants to proceed and pursue that hit or just back off, because maybe he just doesn't want to do nothing, maybe he's on the verge of dropping out."

One objective of the NF is "to build the organization on the outside, become self-supporting, work with those in alliance, any and all illegal ventures to build the funds that can be utilized to take care of members behind the walls or drug deals on the streets." Building the organization "on the streets" was important "[t]o promote the organization so others can recognize the powerfulness of the NF, which is basically the umbrella organization for the Northern Structure and, in a sense, directly, indirectly intimidate those with large quantities of drugs or anything that the NF can use to edify their own system."

NF members on the street were expected to contribute money to the NF "bank," which was the NF fund held for the benefit of the NF members. The contributions from individual members were to be made from dealing drugs or getting "contributions" from drug dealers. The NF members on the "street" were under the control of the Regional Security Department (RSD) to whom they were to report.

**217 Murders, or "hits," had to be sanctioned by higher authority. In NF terminology, approval for murder was called a "green light." A NF member who killed another NF member had to be killed.

B. Northern Structure

The Northern Structure was formed by the NF "as a gang under them to take the heat off [the NF]." NF was superior to NS. NF and NS operated for *520 the common purpose of raising money through crimes to help NF members who are in prison and their families. NF and NS did not use terms like "kill" or "murder" in discussing those acts; they used instead gang language, such as "dealt with" for murder, to conceal the subject of discussion from eavesdroppers.

C. Testifying NF Members

C-1. Ronnie Shelton

In May 1985, Shelton, while serving time at San Quentin, was recruited into the NF by NF member Michael Sosa. Shelton had been a member of the NS prior to his entry to the NF. In December 1990, Shelton became the RSD for San Jose.

After his indictment, Shelton decided to leave the NF and testify for the prosecution. Among the reasons Shelton cited for his decision were exhaustion and the fact that the NF wanted to control his defense. Shelton was facing the death penalty for the murders in which he participated. Shelton pled guilty to four first degree murders (i.e., the murders of Herrera, Valles, Apodaca, and Perez). For these murders, Shelton received a total prison term of 100 years to life. Shelton was 35 years old when he testified. Shelton said he did not expect to live long enough to be eligible for parole, and that, for his participation in the four murders, he deserved to be in prison for the rest of his life.

C-2. Louis Chavez

Chavez was recruited into NF from NS in 1989 at the Tehachapi State Prison (Tehachapi) by Joseph Hernandez and Vincent Arroyo. Chavez knew defendant while both of them were at Tehachapi. After the murders of Herrera, Rosas, and Baca, codefendant Lopez told Chavez that Chavez's status in the NF was "on freeze" until Chavez brought them a "body," i.e., committed a murder. Chavez said this meant that "if [he] didn't take care of business, they [the NF] were going to take [him] out," i.e., kill him.

Chavez agreed to testify for the prosecution on condition that he be prosecuted only for the crimes

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that he had actually committed.

C-3. Jerry Salazar

Salazar was recruited into the NS when he was 18 years old. Salazar should have been sent to the California Youth Authority (CYA), but because *521 he had been paralyzed from a car accident that happened when he was 16, and had been confined to a wheelchair, Salazar could not be accommodated at the CYA; instead, Salazar was sent to the CDC. As part of the NF recruitment process, Salazar was given secret documents that explained the NS and contained the 14 "bonds," or the "dos and don'ts of the Structure." Salazar was active in the NS from 1987 to 1993.

Salazar joined the NF while he was in custody on the present charges. In 1993, while in a holding cell with Arroyo, Salazar was told by Arroyo that he (Arroyo) knew that Salazar had spoken with the San Jose Police Department, but that Salazar should not worry because he (Arroyo) was going to "let it slide because as long as [Salazar] didn't give nobody up on a murder." Salazar, in violation of the NF's code of silence, had told the San Jose Police in 1992 that **218 Guzman, Shelton, Villanueva, and codefendant Lopez were members of the NF.

After the 1993 conversation with Arroyo, Salazar overheard codefendant Trujeque tell codefendant Serna that they would let Salazar slide for a while and then kill him.

In 1993, Salazar, in a written plea agreement, agreed to testify for the prosecution with the understanding that the prosecution would decide whether his sentence was to be life without the possibility of parole, or 50 years to life.

C-4. Anthony Guzman

Guzman joined the NS while in prison in late 1987 or early 1988, after reading the gang's 14 "bonds" and agreeing to live by them.

In August 1992, Guzman fled to Mexico to avoid arrest on the indictment. Guzman's wife, who was also indicted, joined him, but later returned to the United States. Back in the U.S., Guzman's wife told Guzman in a telephone conversation that the NF wanted to kill him because they believed that he was cooperating with the district attorney. Guzman explained that he decided to testify for the government because people had died "for nothing"; he was facing the death penalty; his wife was indicted; and his children were upset.

C-5. Mendoza, Saldivar, Arroyo

Other NF members who testified for the prosecution were Carlos Mendoza and Roland Saldivar. NF member Vincent Arroyo pled guilty, pursuant to his plea agreement, but did not testify.

**522 D. Conspiracy; Some Overt Acts*
D-1. NF's Hit List

While at Tehachapi, Chavez, Hernandez, and Pablo "Panther" Pena prepared an NF "hit" list, which was a list of persons who should be killed by the NF for various reasons. Among the people in the list were Tony "Little Weasel" Herrera and James "Jocko" Esparza, both for being gang drop-outs, and Carlos Mejias, for having an NF member stabbed. Eli Rosas was not on that list.

When Chavez was paroled, he took the "hit" list with him. Chavez was to give the hit list to Cervantes, but did not. Instead, on July 25, 1991, Chavez gave the hit list, as well as an NF membership list, to his parole officer, E.J. Allen.

D-2. Chavez as Regional Security Director

While Chavez was in prison, he was ordered by NF Mesa member Hernandez to organize the NF's San Jose regiment. Chavez was to work on the NF's bank. Hernandez told Chavez to "organize it, you know, get it together," and maintain it by "dealing drugs" and "robbing connections." Chavez was to report by letter to Hernandez, who was still in prison, matters relating to the NF.

When Chavez was released on parole on April 19, 1990, he was made the RSD for San Jose. In violation of Hernandez's "orders," Chavez did not report to Hernandez, and did not execute his assignment as directed. Chavez did sell PCP, but did not put the proceeds into the NF "bank."

D-3. Attempted Murder of Mejias

Chavez testified that Carlos Mejias was not a member of NF. In 1990, the NF wanted to kill

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Mejias because Mejias, while in prison, had ordered the murder of an NF member, which was carried out.

Salazar testified that at a barbecue prepared by his mother at Kelly Park in San Jose on July 4, 1990, Chavez and another NF member, Lencho Guzman, were present. Victor "Sleepy" Esquibel, who had no **219 gang affiliation, was also present. Although not invited, Mejias showed up. Chavez, who knew that the NF wanted Mejias killed, ordered that Mejias's murder be carried out. Salazar, upon Chavez's direction, provided a knife. When Mejias left, Guzman and Esquibel left with him. Guzman and Esquibel returned about 30 *523 minutes later, and told Salazar that Mejias had been killed. In fact, Mejias survived, and was treated for his wounds.

D-4. Shelton Replaces Chavez as RSD

Shelton testified that while he was in prison, he was instructed by the NF leadership to maintain, upon parole, "the spirit" of NF and "get things organized and make sure there was a regiment established." Shelton was paroled to San Jose on May 27, 1990.

In September 1990, Andrew "Mad Dog" Cervantes, who was from the Stockton NF regiment, called a meeting of the San Jose NF members at the home of Lisa Quevas. Among the NF members present were Shelton, Chavez, and Lopez. Trujeque was not present when the meeting started, but arrived later. The meeting discussed subjects like weapons, who in San Jose had drugs they could steal, and the need for members to keep in communication with NF. Toward the end of the meeting, Cervantes promoted Shelton to RSD and demoted Chavez to second in command.

D-5. Lopez Became Second in Command

Lopez was paroled on September 17, 1990, and became second in command to Shelton by December 1990. Shelton testified that at the NF meetings held in December 1990, "[w]e would discuss who was in communication, who had weapons, drugs, people that needed to be killed, people that had drugs and we wanted perhaps for them to pay rent, a percentage to the organization, things of that nature."

Lopez was arrested for parole violation in May 1991. While in jail, Lopez made Salazar RSD for San Jose. At a meeting at the house of Salazar's mother in June 1991, Rosas, who had just been paroled and who was in charge of security while in prison, believed that he, and not Salazar, should be running the "streets." Salazar told Rosas that Lopez had placed him in charge, "and that was it."

When defendant was paroled in the Spring of 1991, Lopez told Salazar from jail to meet defendant. In June 1991, defendant took over control of the NF in San Jose. Chavez told Trujeque that defendant was now in charge of the San Jose NF.

At Lopez's direction, Salazar turned over to defendant the NF "bank" containing between $2,000 and $2,500. Defendant subsequently spent the money on beer, barbecues, and partying. Defendant made Salazar the head of security, which was the second highest position under the RSD.

*524 Defendant was arrested in early July 1991. With defendant's arrest, Salazar took over the "streets." In mid-July 1991, Serna was paroled. Upon Lopez's direction from jail, Serna took over the San Jose regiment from Salazar. Serna testified that Lopez had directed him "[t]o start taking care of business out there, and start building up the bank again, and to rob connections."

D-6. Murder of Herrera

At an NF meeting on November 17, 1990, attended by, among others, Shelton, Lopez, and Trujeque, the NF decided to kill Herrera, a major drug dealer. Herrera had been on the NF hit list. John Blanco, a prominent San Jose drug dealer, who was present at the meeting, said that **220 Herrera had told the police about his activities. Shelton, who had earlier opposed the killing of Herrera because Herrera was assisting the NF by dealing drugs, volunteered to carry out the murder, explaining that the RSD had to set an example.

On November 19, 1990, two days after the meeting, and before Herrera's murder could be carried out, Villanueva, an NF member who was to participate in Herrera's murder, was arrested. Villanueva called Shelton from jail, saying that he believed Herrera had told the police about him.

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On November 20, 1990, Shelton met with Lopez to plan Herrera's murder. Lopez was to obtain a gun and Betsy Spencer's Chevette. Shelton, Lopez, and Trujeque discussed the need to kill witnesses. Trujeque suggested they dump Herrera's body in a park.

Later that day, Shelton, Lopez, and Trujeque met Herrera and asked Herrera to get inside Spencer's Chevette. When Herrera was inside the car, Trujeque displayed a .38 caliber revolver. Trujeque got out of the car, pointed the gun at Herrera, and pulled the trigger twice. The gun did not fire. Herrera got out and started to run. Lopez tackled Herrera. Shelton shot Herrera six times in the head. Trujeque fired his gun again. After more misfires, the gun went off.

Spencer testified she suspected her Chevette was involved in Herrera's murder because on Thanksgiving Day, several days after Herrera's murder, it was discovered on fire. Spencer testified that Lopez had borrowed the car and had later told her that the car was stolen from him when he parked it at a 7-Eleven store with the keys in the ignition.

D-7. First Attempt to Kill Jasso

The NF made two attempts to kill Robert Jasso, a bouncer at JP's bar in San Jose, who was not a member of either the NF or the NS. The first attempt was in the Spring of 1991, and the second was in the Fall of that year.

***525** In December 1990, an NF member reported to Shelton that at Herrera's funeral, Jasso had said: "Fuck Lucky [Shelton], Fuck Lucky, I know [that] Lucky killed [Herrera]." Shelton took Jasso's statements as a show of disrespect to him and the NF. Shelton directed Lopez, his second in command, to have Jasso killed, adding that he wanted all NF members to know that Jasso was to be killed. Shelton said that to let Jasso's disrespect to the NF pass would cause diminution of the NF's power "[a]nd people would just not be willing to cooperate with drug transactions on a respectful level." Jasso's murder was further discussed at the NF meetings in December 1990 and April 1991.

Lopez, Robert Rios, and Jason Vasquez looked for Jasso in late winter or early spring to kill him. However, when they found Jasso, they could not kill him because there were police in the area.

D-8. Murder of Valles

Larry Valles was a PCP dealer. At one NF meeting, the NF discussed the need for Valles "to kick down drugs to the gang." It was decided that Valles needed to be "jacked up."

Shelton subsequently arranged a meeting with Valles. Shelton arrived first. After Valles arrived, Lopez also arrived. Out of Valles's presence, Shelton and Lopez discussed the extortion they were going to make. Valles told Shelton and Lopez that he (Valles) did not pay "rent." Shelton shot Valles between the eyes.

****221** *D-9. Attempted Murder of Urango*

Lopez authorized the murder of Alphonso "Huero" Urango because Urango "disrespected" the NF by not returning two guns, which belonged to the NF. Urango had said that he would trade the guns for a gram of PCP. Salazar testified that Urango's offer was "an automatic green light." Salazar talked with defendant about Urango's murder. In late June, or early July 1991, NF members, including Salazar, Mendoza, and defendant went to Urango's apartment to kill him. When they arrived, defendant told Saldivar and Mendoza to go to the apartment door, knock on it, and shoot Urango when he opened the door. When Saldivar and Mendoza knocked on the door, Urango's girlfriend, who was eight months pregnant, answered the door. Saldivar and Mendoza did not have the "guts" to kill Urango under the circumstances. No further attempts on Urango's life were made.

***526** *D-10. Murder of Rosas*

Rosas was a member of the NS.

On December 31, 1983, two masked men broke into the home of Petra Gonzalez, who was the mother of Rosas' girlfriend. Rosas went to Gonzalez's defense.

After the Gonzalez robbery, and while Pena was in prison with Chavez, Pena told Chavez that he (Pena) had robbed Rosas' home, taking drugs. Pena further told Chavez that he (Pena) believed that Rosas had "snitched on him." Chavez stated that even though Rosas was the victim, Rosas should not

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have told the police because Pena was a member of the NF at the time of the robbery, and Rosas was not.

In late June 1991, after defendant was paroled, defendant discussed the Rosas matter with Salazar. Defendant told Salazar that there was a "green light" on Rosas because Rosas had "snitched on Pablo Pena, Panther." However, defendant wanted to get some confirming "paperwork" first because if he (defendant) was wrong and Rosas was killed, he (defendant) would be killed. Defendant told Salazar that the NF was not to hunt down Rosas to kill him, but that if an NF member should run across him, Rosas should be killed.

On the night of Rosas' murder, Chavez received a telephone call from Albert Reveles and Tim Hernandez. Hernandez told Chavez that he was at a home where Rosas was "running his mouth" about Chavez, saying that Chavez was to be "hit" by the NF. Hernandez asked Chavez what should be done to Rosas, saying he wanted to kill Rosas. Chavez told Hernandez he did not have the authority to authorize the murder of Rosas because defendant was in charge.

Chavez contacted Salazar, who set up a three-way telephone conference with defendant. In that telephone conference, defendant approved the murder of Rosas, saying: "Do what you got to do." Defendant also told Chavez that he (Chavez) had the authority to call the hit.

Hours later, Hernandez called Chavez to report that Rosas had been killed.

Subsequently, defendant told Shelton at San Quentin that Rosas was behind "some drug deal that some drugs were involved and [Rosas] supposedly had snitched on [Pena] who's also an N.F. member." Defendant admitted to Shelton that he [defendant] had called the Rosas "hit."

*527 *D-11. Order to Kill Esparza*

Esparza was on the NF "hit" list that Chavez and Pena had compiled in 1990. Salazar testified that defendant had ordered him to kill Esparza. Defendant told Salazar that Esparza was in trouble because Esparza was claiming that he was a **222 member of the NS, and he was not. Salazar did not carry out defendant's order because he believed that defendant had a "personal thing" on Esparza concerning defendant's girlfriend.

D-12. Plot to Kill Chavez

Shelton testified that after conferring with Lopez, he (Shelton) decided that Chavez should be killed. Lopez had written Shelton that Chavez's "status was on freeze until he (Chavez) [brought] a body to [the organization]," meaning until he "killed somebody" and he proved himself. In August 1991, Shelton began plotting Chavez's murder.

In September 1991, while Shelton and defendant were in prison, Shelton asked defendant why Chavez was not dead yet. Defendant told Shelton that he wanted to kill Chavez himself because he (defendant) had not yet committed a murder for the NF.

Chavez testified that "Smiley Joe" Ramirez had told him that the NF wanted to kill him (Chavez).

D-13. Murder of Esteban Guzman

Salazar testified that in July 1991, Serna called to say that he was bringing drugs for Salazar to sell. When Serna arrived, he told Salazar that the drugs belonged to a "border brother" (i.e., Mexican) whom he robbed. Serna said he shot the drug owner with a shotgun and left no witnesses. The victim turned out to be Esteban Guzman.

Anthony Guzman testified that after the murder of Esteban Guzman, Serna told him that he (Serna) killed Esteban because Esteban was a member of a rival gang. Esteban had died from a shotgun wound to his chest.

D-14. Murder of Baca

Salazar testified that Serna had told him that he (Serna) had killed Marcos "Puppet" Baca with a .22 caliber revolver because Baca was a police informant.

Anthony Guzman also testified that Serna had admitted to him that he and two others had killed Baca with a .22 caliber revolver because Baca "was no *528 good [and] that he was giving up people in the county jail." Guzman, who was superior to

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Serna in the NF, told Serna not to kill anymore because he (Guzman) did not want to be responsible.

D-15. Murder of Apodaca

Sheila Apodaca was, at one time, Lopez's girlfriend. On December 30, 1990, Shelton met Apodaca. The next day, Apodaca gave Shelton a ride. During the ride, Apodaca brought up the subject of Herrera's murder. Apodaca said that she believed Shelton and the others were crazy. Shelton told Lopez about his (Shelton's) conversation with Apodaca. Lopez told Shelton not to worry because Apodaca did not know what was going on.

When Lopez was in prison, he wrote Shelton saying that he thought Apodaca might tell the police what she knew about the Herrera and Valles murders, and that Apodaca should be killed.

On August 26, 1991, at an NF meeting at Guzman's apartment, Apodaca's murder was discussed. Shelton explained that he, Serna, and Salazar all wanted to kill Apodaca. The next day, Shelton and Guzman were arrested. From the county jail, Shelton sent Lopez a message saying that the Perez and Apodaca murders were still on.

Salazar testified that Apodaca was to be killed because Lopez had learned that Apodaca was going to tell the police about Lopez's involvement in the Herrera murder. **223 Lopez called Apodaca a "snitch bitch."

Subsequently, Salazar arranged a meeting with Apodaca at Mt. Pleasant High School. Salazar then told Serna and Trujeque to proceed to the meeting place.

Salazar observed Serna handling a .357 caliber revolver to make sure that there were no fingerprints on the bullets. When Serna and Trujeque went to the appointed place, Salazar stayed behind, nervous from knowing that he had set up Apodaca to be murdered. When Serna and Trujeque returned, Serna told Salazar that he (Serna) had shot Apodaca twice in the head.

D-16. Murder of Perez

Lopez told Shelton that Ray "Chocolate" Perez was giving him a hard time, was being irresponsible, and was losing drugs. Lopez said that Perez, who was not an NF member, was disrespecting him. Lopez wanted to kill Perez, but Shelton asked Lopez to wait. When Lopez was in prison, Lopez *529 wrote Shelton saying that Perez should be killed because Perez was talking to law enforcement. Perez's murder was discussed at the same NF meeting in which Apodaca's murder was discussed.

On August 29, 1991, Salazar met with Trujeque and Mendoza. Salazar volunteered to lure Perez to a meeting, and accompanied Trujeque and Mendoza to that meeting. When they arrived at the meeting place, Perez came up to the window of their car and spoke with them. When Perez got in the car, the foursome drove off. When the car stopped, Salazar and Mendoza shot Perez. Salazar explained this was his first murder and he committed it for the gang.

D-17. Second Attempt to Murder Jasso

Salazar testified that Shelton and Lopez authorized the murder of Jasso because Jasso was "disrespecting the NF." Jasso was a close friend of Herrera and was "kind of pissed off because the NF killed [Herrera]."

In late August and early September 1991, Santos "Bad Boy" Burnias, an NF member, called Salazar, who was in Utah, and told him to return to San Jose because the NF had to "take care" of Jasso. When Salazar returned, he, Burnias, and Joey Gonzalez went to JP's Bar in Gonzalez's jeep. When they saw Jasso, Burnias got out of the jeep, saying he would be back. Within five minutes, Burnias was back. Burnias told Salazar and Gonzalez that he had just shot Jasso three times.

Burnias later admitted to Shelton that he had shot Jasso, saying he was "just taking care of business."

Jasso survived the assassination attempt. He was treated for gunshot wounds to his shoulder and head.

CONTENTIONS

Defendant contends:

1. The prosecution waived any claim that defendant had violated his plea agreement when it failed to bring its motion to vacate the plea agreement until 16 months after it had been entered into, and almost

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six months after defendant's second statement to the prosecution which was the supposed trigger for the motion; and the trial court therefore erred and deprived defendant of his state and federal constitutional rights to due process by granting the prosecution's untimely motion to vacate the plea agreement.

*530 2. Defendant's sentence of 60 years to life violates the federal constitutional protection against cruel and unusual punishment given the improper vacating of his plea agreement under which he would have served only five years.

**224 3. Trial counsel deprived defendant of his Sixth Amendment right to effective assistance of counsel during the proceedings on the motion to vacate his plea agreement by failing to fully investigate the likelihood of defendant passing a polygraph examination prior to stipulating to the admission of the results of a polygraph examination.

4. The trial court violated defendant's Sixth and Fourteenth Amendment rights by precluding defendant from cross-examining two prosecution witnesses and conducting direct examination of one potential defense witness regarding the killing of Farfan, which would have elicited evidence that the prosecution pursued a flawed policy of presenting unreliable accomplice witnesses against defendant and that a critical witness against defendant was unworthy of belief.

5. The trial court violated defendant's Sixth and Fourteenth Amendment rights to confrontation and due process by unduly restricting the scope of cross-examination of Kracht regarding the disposition of a case against Pena, which would have shown that defendant had no motive to agree to kill Rosas and thus prejudiced his defense against the charges of murder and conspiracy to commit murder.

6. The trial court violated defendant's state and federal constitutional rights to due process and an impartial jury trial by refusing to instruct the jury on the lesser included offense of second degree murder with respect to the conspiracy to commit murder in count 1 and the murder of Rosas in count 12.

7. The trial court deprived defendant of his state and federal constitutional rights to a trial by jury and due process by failing to instruct the jury to determine the essential factual question whether one or multiple conspiracies existed.

8. Defendant was deprived of his Sixth and Fourteenth Amendment rights to a jury trial and due process by the trial court's refusal to instruct the jury to unanimously agree on the facts underlying the elements of the conspiracy, an error which is reversible because it is impossible to determine whether the jury unanimously agreed as to whom defendant conspired to murder.

*531 9. Defendant was deprived of his Sixth and Fourteenth Amendment rights to due process and notice of the allegations that he conspired to murder or assault both Urango and Esparza, where he did not learn of these allegations until four months into trial.

10. Defendant's conviction for conspiracy to commit murder violates state and federal due process guarantees because a conviction for conspiracy to kill one of various persons without agreement upon who was to be killed is unconstitutionally vague and generic.

11. Defendant's conviction for conspiracy to commit murder must be reversed for constitutionally insufficient evidence because this court cannot determine whether or not the jury found him guilty of conspiring to kill a person for whom there is constitutionally insufficient evidence in support of conviction.

12. The trial court violated defendant's state and federal constitutional rights to due process and a fair trial by jury by refusing to give a legally correct defense-requested jury instruction which was supported by the evidence and which pinpointed the defense theory of the case.

13. The prosecutor committed prejudicial misconduct and deprived defendant of his state and federal constitutional rights to due process and a fair trial by making an inflammatory comment and an ungrounded **225 attack on defense counsel in closing argument.

14. Defendant was improperly sentenced to consecutive terms of 25 years to life for both the Rosas murder and the conspiracy to commit murder, in violation of section 654.

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DISCUSSION

Vacation of Plea Agreement

Defendant contends the prosecution waived any claim that defendant had violated his plea agreement when it failed to bring its motion to vacate the plea agreement until 16 months after it had been entered into, and almost six months after defendant's second statement to the prosecution, which was the supposed trigger for the motion; and the trial court therefore erred and deprived defendant of his state and federal constitutional rights to due process by granting the prosecution's untimely motion to vacate the plea agreement. We disagree.

On March 23, 1993, defendant entered into a plea agreement with the prosecution, which provided in pertinent part: "(1) [Defendant] will enter a ***532** plea of guilty to count 22 of the indictment in this case (gang-participation, a violation of Penal Code section 186.22 [subdivisions] (a) [and] (c)) and will admit allegations (to be added to the indictment) of having served two separate prior prison terms within the meaning of Penal Code section 667.5 [subdivision] (b). [¶] If, at the time of sentencing, [defendant] has fully complied with the terms and conditions of this agreement, the People will move to dismiss the conspiracy charge (Count 1) and the murder charge (Count 12), and [defendant] will be sentenced to the aggravated term of three years on Count 22 (gang-participation) plus one year for each prior prison term, for a total of five years; [¶] ... [¶] (4) Sentencing shall not occur until after the completion of any trial or trials for any of [defendant's] co-defendants in this case. [¶] ... [¶] (6) [Defendant] shall truthfully disclose all information with respect to the activities of himself and others concerning all matters about which agents or representatives of The People inquire of him. [¶] (7) [Defendant] shall cooperate fully with law enforcement authorities in their investigation and prosecution of this case.... [¶] (8) [Defendant] shall truthfully testify at any trial or retrial or other court proceeding with respect to any matter related to this case about which The People may request his testimony or pursuant to order of the court. [¶] (9) [Defendant] must at all times give complete and truthful information; should [defendant] give false, incomplete or misleading information or testimony, or otherwise violate any provision of this agreement, this agreement shall be null and void and [defendant] shall thereafter be subject to prosecution for any criminal violation of which The People have knowledge including perjury. Any such prosecution may be premised upon any information provided by [defendant] and such information may be used against him; such a prosecution may not proceed, however, unless the Court, after an independent review of the relevant facts, finds that there has been a material violation of this agreement by [defendant]."

On July 13, 1994, the prosecution moved to vacate defendant's guilty plea and the plea agreement on the ground that defendant had violated the terms of the plea agreement "by providing to the prosecution material information, which is untrue." Defendant opposed the motion, arguing laches and specific performance by defendant.

On December 21, 1994, the court, following a hearing, granted the People's motion on the basis of its finding that defendant ****226** had willfully violated the terms of the plea agreement. The court stated: "And I will rule as follows: In evaluating the evidence in this case if the only evidence that was before the court was the two statements made by the defendant I would certainly come to the conclusion that the statements were inconsistent. But based upon that evidence alone I don't believe I could conclude and I ***533** wouldn't have concluded that there was a willful attempt on the part of the defendant to violate the witness agreement that he entered into. [¶] But in addition to that evidence that was presented during the course of the hearing we had the testimony of agent Hilley who testified that the defendant, in effect, failed the polygraph examination as it related to two crucial questions. And yes, I did follow his testimony as to how he arrived at the conclusion that if one is deceptive as to one question then the conclusion is that he would be deceptive as to all of the questions, and I did understand his testimony in that regard. But, nevertheless, his testimony was the defendant was deceptive as it related to questions posed to him about material matters. [¶] Additionally, there was the testimony of the defendant which the court considered--could consider as well and I did. My evaluation of the defendant's testimony was that he was not credible in many respects. He almost conceded withholding certain things, not quite, but almost. And I was left with the impression that he was less than candid on the witness stand because of some threat that had been made to him or probably

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more likely members of his family that he was unwilling fully to go into. And that was my impression as to what may well be the reason for the defendant's inconsistent statements made to the prosecution during the course of [the] two occasions when he was questioned. [¶] Therefore, my conclusion is that there was a willful violation of the witness agreement in this case and that that willful violation amounts to material evidence that relates to this particular case. [¶] Specifically, I find that he willfully violated paragraph 6 of the witness agreement which required him [to] truthfully disclose all information with respect to the activities of himself and others concerning all matters about which agents or representatives of the People inquire of him. [¶] I also find that he willfully violated paragraph 9 which required him to at all times give complete and truthful information. [¶] Therefore, the witness agreement and the disposition entered into by the defendant is now set aside. The original charges are reinstated."

[1] The power of the court to set aside a plea bargain on the ground of breach by a defendant of its terms is beyond question. " ' "A plea agreement is, in essence, a contract between the defendant and the prosecutor to which the court consents to be bound." ' " (*People v. Armendariz* (1993) 16 Cal.App.4th 906, 911, 20 Cal.Rptr.2d 311.) "When a guilty plea is entered in exchange for specified benefits such as the dismissal of other counts or an agreed maximum punishment, both parties, including the state, must abide by the terms of the agreement." (*People v. Walker* (1991) 54 Cal.3d 1013, 1024, 1 Cal.Rptr.2d 902, 819 P.2d 861.)

As stated in *People v. Collins* (1996) 45 Cal.App.4th 849, 863-864, 53 Cal.Rptr.2d 367: "The reciprocal nature of a plea bargain agreement mandates that either party to the agreement be entitled to enforce the agreement ***534** in a situation where the party is deprived of the benefit of the bargain. [Citations.] ... Failure to hold a defendant to the terms of his bargain would undermine the integrity of the judicial process. In this case, defendant's breach of his bargain included testifying falsely, conduct which is manifestly corrosive of our system of justice. There is no question ****227** that courts have inherent authority to protect the integrity of the judicial process. [Citation.]"

[2] We note that here the trial court, in granting the prosecution's motion, did not address defendant's laches argument. Yet, defendant did nothing to secure a ruling on that specific issue. Defendant's failure precludes him from raising the issue on appeal. "Because defendant failed to obtain a pretrial ruling on the issue and did not pursue his objection at trial, we will not address his contention, for it is procedurally barred. [Citation.]" (*People v. Roberts* (1992) 2 Cal.4th 271, 297, 6 Cal.Rptr.2d 276, 826 P.2d 274.)

[3] In any event, defendant's laches and waiver argument is without merit. The record discloses that defendant made two statements following the plea agreement. The first statement was made on the same date as the plea agreement, March 23, 1993. The second statement was made 10 months later on January 26, 1994. The prosecution's motion to vacate defendant's plea agreement was filed on July 13, 1994, six months after the second statement. Defendant complains that the six-month delay in the filing of the prosecution's motion to vacate the plea agreement was "in effect a ratification and acceptance of [defendant's] statements," and was "tantamount to waiver." We do not think so.

First, "[t]he prosecution of criminal offenses on behalf of the People is the sole responsibility of the public prosecutor. [Citations.] [¶] The prosecutor ordinarily has sole discretion to determine whom to charge, what charges to file and pursue, and what punishment to seek. [Citation.] ... An individual exercise of prosecutorial discretion is presumed to be ' "legitimately founded on the complex considerations necessary for the effective and efficient administration of law enforcement...." ' [Citations.] [¶] Exclusive prosecutorial discretion must also extend to the *conduct* of a criminal action once commenced. 'In conducting a trial a prosecutor is bound only by the general rules of law and professional ethics that bind all counsel.' [Citation.] The prosecutor has the responsibility to decide in the public interest whether to seek, oppose, accept, or challenge judicial actions and rulings. These decisions ... involve 'the complex considerations necessary for the effective and efficient administration of law enforcement.' " (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 451-452, 279 Cal.Rptr. 834, 807 P.2d 1063, original italics.)

[4] ***535** Here, moving to vacate defendant's guilty plea on the basis of defendant's breach of the terms

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of the plea agreement was effectively exercising prosecutorial discretion to charge and prosecute defendant, and to conduct that prosecution in the manner deemed best " 'for the effective and efficient administration of law enforcement.' " (*Dix v. Superior Court, supra,* 53 Cal.3d at p. 452, 279 Cal.Rptr. 834, 807 P.2d 1063.) Given the complexity of this case, six months was not an unreasonable time for the prosecution to decide to hold defendant to his bargain and require defendant to suffer the consequences of his breach of its terms.

Second, the plea agreement implicitly authorized the prosecution to move to vacate defendant's plea for breach by defendant of its terms at any time prior to the conclusion of the trial. This implicit authority is clear from the language of the plea agreement, which inter alia provided that "[s]entencing shall not occur until after the completion of any trial or trials"; defendant "shall truthfully disclose all information with respect to the activities of himself and others concerning all matters about which agents or representatives of **228 The People inquire of him"; defendant "shall cooperate fully with law enforcement authorities in their investigation and prosecution of this case"; defendant "shall truthfully testify at any trial or retrial or other court proceeding with respect to any matter related to this case about which The People may request his testimony"; and defendant "must at all times give complete and truthful information."

Defendant's obligation under the agreement to tell the truth and to cooperate fully with the prosecution was clearly continuing. That obligation was to last throughout the entire course of the trial. Consequently, the prosecution was not required to act immediately, and piecemeal, to void the plea agreement upon any particular breach. The prosecution had discretion under the agreement to look at how a particular breach might affect the entirety of its trial strategy, and to act only when it was convinced that voiding the plea agreement did not jeopardize its ability to prove its case. The prosecution could choose to act at any time within the time frame of the agreement, which was, at the very least, the full course of the trial.

[5] In any event, the six-month delay, if a delay it was, did not prejudice defendant. Defendant's trial did not start for over two years after his plea agreement had been set aside. Defendant had, therefore, sufficient time to prepare for his defense.

Defendant's citation to *People v. Miller* (1992) 6 Cal.App.4th 873, 8 Cal.Rptr.2d 193 and *In re Ronald E.* (1977) 19 Cal.3d 315, 137 Cal.Rptr. 781, 562 P.2d 684, is misplaced. Neither case involved vacating a plea agreement for violation by the defendant of its terms.

*536 We conclude the prosecution's motion to vacate defendant's plea agreement was not barred by laches or waiver, and that the trial court did not err in vacating defendant's plea agreement.

Cruel and Unusual Punishment

[6] Defendant contends his sentence of 60 years to life violates the federal constitutional protection against cruel and unusual punishment given the improper vacating of his plea agreement under which he would have served only five years. The contention is without merit.

Defendant concedes that "a sentence of 60 years to life for murder and conspiracy is not per se cruel and unusual." Defendant argues merely that because the vacation of his plea agreement was invalid, he should have been entitled to receive the benefit of his bargain, which was a sentence of five years, and, therefore, the 60-years-to-life sentence imposed on him was cruel and unusual.

Because we have determined that the trial court committed no error in setting aside defendant's plea bargain, defendant's cruel and unusual challenge also fails.

Ineffective Assistance of Counsel

Defendant contends trial counsel deprived him of his Sixth Amendment right to effective assistance of counsel during the proceedings on the motion to vacate his plea agreement by failing to fully investigate the likelihood of his passing a polygraph examination prior to stipulating to the admission of the results of a polygraph examination. We disagree.

It has repeatedly been held that " '[a] convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components.' [Citations.]

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'First, the defendant must show that counsel's performance was deficient.' [Citations.] Specifically, he must establish that 'counsel's representation fell below an objective **229 standard of reasonableness ... under prevailing professional norms.' [Citations.]" (*People v. Ledesma* (1987) 43 Cal.3d 171, 216, 233 Cal.Rptr. 404, 729 P.2d 839.) "In addition to showing that counsel's performance was deficient, a criminal defendant must also establish prejudice before he can obtain relief on an ineffective-assistance claim." (*Id.* at p. 217, 233 Cal.Rptr. 404, 729 P.2d 839.) "Errorless counsel is not required...." (*People v. Williams* (1988) 44 Cal.3d 883, 937, 245 Cal.Rptr. 336, 751 P.2d 395.)

Moreover, "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a *537 result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result." (*Strickland v. Washington* (1984) 466 U.S. 668, 697, 104 S.Ct. 2052, 80 L.Ed.2d 674.)

[7] Here, after the prosecution had filed its motion to set aside the plea agreement, defendant's counsel and the prosecutor stipulated that defendant would submit himself to a polygraph examination by an expert acceptable to both parties, and that the results of the test would be submitted to the court to aid it in its determination of whether defendant had committed a material breach of the plea agreement. The defense and the prosecution then mutually agreed on FBI special agent Ron Hilley to conduct the polygraph test on defendant. Hilley concluded that defendant was deceptive in his answers to the four relevant questions that were related to a particular inconsistency in defendant's statements.

In its order setting aside defendant's plea agreement, the court stated that it relied in part on Hilley's testimony.

In arguing ineffective assistance, defendant asserts that "reasonably competent counsel would not stipulate to the admission of polygraph results without first conducting some investigation to ensure that the stipulated evidence would be favorable to [defendant]." (Original underscore.) Defendant points to no place in the record, however, which would indicate that trial counsel had agreed to the stipulation relating to defendant's polygraph examination without first reasonably informing himself of the probable outcome of such an examination. Defendant bears the burden of showing to this court that trial counsel's agreement to the polygraph examination stipulation was not an informed decision. As stated in *People v. Mitcham* (1992) 1 Cal.4th 1027, 1058, 5 Cal.Rptr.2d 230, 824 P.2d 1277: "When a defendant on appeal makes a claim that his counsel was ineffective, the appellate court must consider whether the record contains any explanation for the challenged aspects of the representation provided by counsel. 'If the record sheds no light on why counsel acted or failed to act in the manner challenged, "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," [citation], the contention must be rejected.' [Citations.]"

On this record, defendant has not carried his burden of showing that trial counsel's decision was not informed. Presuming an informed decision *538 by trial counsel, we must further presume that trial counsel's decision was a tactical choice which we cannot, for such lack of showing, review in this appeal.

**230 *Non-Charged Homicide of Farfan*

[8] Defendant contends the trial court violated his Sixth and Fourteenth Amendment rights by precluding him from cross-examining two prosecution witnesses and conducting direct examination of one potential defense witness regarding the killing of Farfan, which would have elicited evidence that the prosecution pursued a flawed policy of presenting unreliable accomplice witnesses against defendant and that a critical witness against defendant was unworthy of belief. The contention is without merit.

Salazar, Arroyo, and Mendoza, who were indicted with defendant and other codefendants, entered guilty pleas. The prosecution thereafter called Salazar and Mendoza to the witness stand, but did

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not call Arroyo.

Defendant joined a defense motion to allow the defense to cross-examine Salazar regarding the Farfan murder. In particular, the defense wanted to show to the jury that Salazar had made the statement that Arroyo had authorized Farfan's murder, and that Arroyo had denied authorizing Farfan's murder. The attorney representing codefendant Trujeque told the court at a bench conference that "[o]ne of the two of them is lying. And, therefore, there is a problem with the deals that they've cut with the prosecution." The prosecution objected that the proffered evidence constituted impeachment on a collateral matter. The court told the defense that if it decided to bring up the Farfan murder, which happened after the indictment in this case, it did so at its own risk if the evidence turned out to be inadmissible because it would require an admissibility hearing.

On February 7, 1997, prior to Salazar's testimony, the court took up the Farfan issue again. The prosecution argued that evidence relating to the Farfan murder would be admissible only if Arroyo testified, since evidence of Salazar's participation in that murder would then be admissible as a prior bad act for impeachment; moreover, if Salazar's testimony was the result of a plea bargain in which the murder of the Farfan case was dismissed, "then that could be presented also as an issue, although I would say parenthetically that his testimony [was] not predicated on the dismissal of the Farfan case."

The defense agreed with the prosecution that evidence of the Farfan homicide was admissible only if Arroyo testified. However, counsel for codefendant Trujeque expressed his intention to attack Salazar's credibility ***539** with the Farfan homicide because Salazar's and Arroyo's statements respecting that homicide contradicted each other. The court asked Trujeque's attorney if he intended to call Arroyo as a witness if the prosecution did not call Arroyo. Trujeque's attorney responded he would do so if Salazar testified that Arroyo had authorized Farfan's murder. The prosecution stated that it had been informed by Arroyo's attorney that if the defense attempted to call Arroyo as a witness, Arroyo would assert his right against self-incrimination, adding that if Arroyo testified the prosecution would not grant Arroyo immunity. The court stated it was disposed to allow the defense to ask Salazar questions relating to the Farfan murder.

On March 17, 1997, just prior to the commencement of Salazar's cross-examination, the defense brought up again the issue of whether it could ask Salazar questions on the Farfan homicide and asked the court for a hearing on the issue. The prosecution restated its intention not to call Arroyo as a witness, and further told the court that Arroyo's attorney had informed her that Arroyo "will take the ****231** Fifth and will not testify if called as a witness by the defense."

The court did not rule on the issue, stating instead that it "would like to see how the situation develops," and inquiring of the defense what it intended to ask Salazar. Trujeque's attorney responded that he would ask Salazar if he (Salazar) had ordered Farfan's murder. If Salazar answered he did not, he (Trujeque's attorney) would then ask Salazar if Arroyo did. The court stated: "Well, let me indicate this, Mr. Salazar has made it clear in no uncertain terms he's testifying truthfully and turned his life around. If you want to impeach his claim of truthfulness by asking him whether he was involved in the Farfan murder, you can. If you, and, I take it, if you do, that's a prerequisite to impeaching him, assuming that he says he was not. [¶] As far as going any further with this witness as to who ordered it and that sort of thing, that's premature. That sounds like you're attempting to set up impeachment of Arroyo. He has not testified yet. We don't know if he's going to testify. Should he testify, we can revisit the issue."

On March 18, 1997, during Salazar's cross-examination, the defense explained its theory of admissibility, which was that the Farfan homicide was an impeachable offense as to Salazar, and would further show that Salazar had a reason not to be truthful about his role in that homicide because his plea agreement was conditioned upon his non-involvement in it. The court replied that if it let in any mention of the Farfan homicide, it would let in all facts surrounding that homicide.

Defendant joined the motion to allow Salazar to be examined about the Farfan homicide.

***540** The court denied the defense request, stating: "[M]y ruling at this point subject to counsel persuading me differently is that that subject is not

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to be covered in cross-examination. I will sustain the [Evidence Code section] 352 objection. In so doing I'm considering the amount of time that we would have to devote to the Farfan matter. But more than that, I'm also considering everything I've heard in cross-examination so far, and I used the term ammunition, it's not a legal term. There's been a wealth of evidence that has been used so far to attack the credibility of this witness, and what has occurred so far during cross-examination. And it seems to me the Farfan matter isn't something crucial. So I find the relevancy to be substantially outweighed by undue consumption of time and confusing the issues."

On March 19, 1997, the court allowed the parties to discuss the Farfan homicide issue further. The defense made an offer of proof that included the following: (1) Salazar's ex-wife became romantically involved with Farfan in the late summer of 1992, and the two lived openly together in January 1993; (2) Salazar knew that his ex-wife was living with Farfan; (3) Salazar stated in his June 23 statement to the police that while he was in a holding cell in early 1993, he heard Arroyo say that a "green light" should be placed on Farfan because Farfan had cheated the NF out of its money; (4) in September 1993, Farfan told parole agent E.J. Allen that his (Farfan's) life was in danger because he was dating Jessica Salazar and another woman; (5) Farfan was murdered on September 27, 1993; (6) Salazar met Louis Oliverez in 1989; (7) on October 7, 1993, Nancy Hermocillo told the police that on September 23, 1993, which was four days prior to Farfan's murder, she was at a friend's house and overheard a telephone conversation between Salazar and Oliverez wherein Salazar had asked Oliverez to kill Farfan; and (8) Salazar's plea agreement was conditioned **232 upon Salazar's noninvolvement in the Farfan murder.

On March 26, 1997, the court once more denied the defense motion, reasoning that the prosecution did not intend to call Arroyo as a witness. The court admitted that the proffered evidence was relevant, but found it inadmissible under Evidence Code section 352 because admission of the evidence would confuse the jury and consume an undue amount of time. The court explained: "The issue of the admissibility of testimony concerning Paul Farfan, as I recall, arose in the context of a discussion at the bench where it was anticipated that Mr. Salazar and Mr. Arroyo would both testify. And the offer of proof was that their testimony would conflict as it relates to the subject of the green light on Paul Farfan, thus establishing that someone's not telling the truth, whether it's Mr. Salazar or whether it is Mr. Arroyo. And at that time, as I recall, I indicated preliminarily that I would allow some questioning in that area. [¶] Now, since that discussion, my *541 understanding at this point is that Mr. Arroyo is not going to be testifying as a witness. That may change. If he does testify as a witness, this issue undoubtedly will be revisited, because I invite Mr. Mayfield [counsel for Trujeque] to revisit the issue. But the issue is not squarely before the court now. [¶] ... [¶] The issue as I indicated is a [Evidence Code section] 352 issue. It is not a relevancy issue because obviously this testimony satisfies in my opinion the defense of relevant evidence in California. But being a [Evidence Code section] 352 issue, the court has to look at the probative value and weigh it against the possibility of confusing the issues, principally confusing the jury as well as the undue consumption of time. [¶] Now, the justification for offering this testimony in a very general sense is two-fold. One, it's the credibility of Jerry Salazar. And then, No. 2, something that I have quite--I have not completely understood, that is, Mr. Selvin [counsel for codefendant Herminio Serna], the argument about the theory--the theory of the conspiracy, its admissibility under the theory of the conspiracy. [¶] ... [¶] Credibility is a very broad term. Whether they're talking about credibility in a general sense that Jerry Salazar is a liar or in a more specific sense that he's a liar in this particular case, has lied, and even more particularly has violated the plea agreement by not telling the truth. We're still talking about credibility. [¶] ... [¶] [S]o far as it relates to Mr. Salazar, he has been impeached about prior inconsistent statements in a number of instances by defense counsel. Additionally, he's admitted lying in the past, and not just as it relates to the June '93 interview, but he has been compelled or persuaded to admit that he lied in other instances on the witness stand. [¶] Defense counsel certainly can argue the significance of his inconsistent statements, certainly can be argued that he has lied and is in fact an admitted liar. [¶] But not only that, as it relates to the use of the Farfan murder as an example of an act of moral turpitude which bears on his credibility, Mr. Salazar has been confronted with a number of instances that counsel can use to argue

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the point of credibility. [¶] There's the bowling alley set up that Mr. Salazar was involved [in] whereby an individual from Fresno was robbed and pistol whipped. [¶] There's the incident at J.P.'s involving two Chinese males that Mr. Salazar was involved with whereby he ... sucker punched one of the individuals after apologizing to him, suggesting that he is a man of bad character not simply because he's violent, but there's also the suggestion he's homophobic. [¶] There's an incident described in the testimony at a disco where Mr. Salazar was there with Mr. Lopez and **233 Mr. Shelton. [¶] There's the incident involving Roland Saldivar's uncle where Salazar admitted on the stand that he pointed a gun at the individual. [¶] There's the issue involving Mr. Urango where Mr. Salazar admitted to looking for him to kill him. [¶] There's the incident at King and Story Road where Mr. Salazar was the driver and a passenger shot, apparently wounding several Surenos. [¶] There's the incident involving ... Alex Flemate, where *542 Mr. Salazar was involved in a plot to kill him. [¶] There's the issue involving Spookio. And one of the interpretations of the evidence that I would assume the defense would find favorable was their suggestion that Mr. Salazar was involved in a plot to kill Spookio motivated by jealousy. [¶] There's the Beto Jasso incident, attempted killing of Carlos Mejias, that Mr. Salazar was involved in. [¶] We heard about a New Years incident I believe in Watsonville where Mr. Salazar had a stabbing instrument and apparently stabbed the wrong person by accident. [¶] We've heard that he planned the murder of one of the defendants in this case, Eddie Vargas. [¶] There's even been a suggestion that when he was thrown in the hole when he was in prison just before his release that he was involved in some inappropriate activity. [¶] And then I also made note of his involvement in a robbery of a drug dealer in the City of Fresno. And there are others. [¶] The point I'm making is there's ample evidence to attack the credibility of Mr. Salazar based not only on his inconsistent statements of his admissions of being untruthful, but based on a number of specific instances. This is significant because in my opinion it lessens the probative value of the Paul Farfan incident. [¶] So what I find is the probative value, although there is some probative value, is not particularly extensive for all the reasons that I listed, and in particular the specific instances which counsel has inquired into already. [¶] What I do find is to allow the inquiry into the Paul Farfan incident as described in the offer of proof will cause undue consumption of time and can lead to the confusing of the jury in this case because one possible situation is a mini-trial where the death of Paul Farfan will be litigated. Certainly the People are allowed to litigate that issue if I allow the defense to do so. [¶] In short, I find that the probative value is outweighed by the factors I cited. The court's ruling is the testimony is not admissible. [¶] I want to remind in particular Mr. Mayfield, if we have a situation arise similar to what we envisioned in the past, we, being all of us, involving Mr. Arroyo testifying, then the court is happy to revisit the issue."

On April 16, 1997, the defense again sought to bring out the issue of Salazar's perjury on the basis of the conflict between Salazar, who said that Arroyo had authorized Farfan's murder, and Arroyo, who denied authorizing such murder. The defense wanted to question Mendoza, who Salazar said was present when Arroyo gave the green light to murder Farfan. Trujeque's counsel argued that he should be allowed to question Mendoza whether Arroyo had given the "green light," and be allowed to call Arroyo to ask whether he authorized the murder.

The prosecution responded that if the court allowed evidence of the Farfan homicide to come in, it was going to prove that what Salazar had said was true.

*543 The court reiterated its ruling that evidence of the Farfan homicide was inadmissible, adding: "It was mentioned this afternoon that as it relates to the issue of credibility, Mr. Mayfield indicated he wanted to establish that Salazar will lie about murders. Well, that's already been established in the testimony that he made some false accusations as it relates to who participated in what, and I know you're all familiar with that testimony. [¶] The right **234 to confront and cross-examine is not without limitation as we all know. And I feel that as it relates to Mr. Salazar, he has been confronted and cross-examined, not only at length, but with reference to a number of subjects where counsel would be able to argue forcefully that the man is a liar when this case is argued."

On August 15, 1997, the court denied defendant's motion for a new trial which defendant based, inter alia, on the ground of error in precluding evidence

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relating to the Farfan incident.

[9] The standard of review for Evidence Code section 352 challenges is abuse of discretion. "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid.Code, § 352.)

On appeal, " '[a] trial court's exercise of discretion will not be disturbed unless it appears that the resulting injury is sufficiently grave to manifest a miscarriage of justice. [Citation.] In other words, discretion is abused only if the court exceeds the bounds of reason, all of the circumstances being considered. [Citation.]' " (*People v. Green* (1995) 34 Cal.App.4th 165, 182-183, 40 Cal.Rptr.2d 239.)

The underlying assumption in defendant's challenge is that the proffered evidence relating to the Farfan incident would have shown that either Salazar or Arroyo was lying. The assumption is flawed. The prosecution repeatedly told the parties and the court that it was not going to call Arroyo as a witness, and, in fact did not call Arroyo. Because Arroyo did not testify, his version of the story was not before the jury. Consequently, the jury did not know that Arroyo's version was in conflict with Salazar's version. It follows that while Arroyo's version was relevant as tending to discredit Salazar, the court could reasonably conclude it was not probative enough to outweigh its potential for prejudice in terms of time consumption and issue confusion. The prosecution had indicated that if Arroyo testified, it would adduce evidence to prove that Salazar was telling the truth. The court, for its part, stated that if it allowed the defense to bring out evidence relating ***544** to the Farfan incident, it would also have to allow the prosecution to litigate the issue. The result would be a minitrial on a crime with which defendant was not charged, resulting in jury confusion and inordinate consumption of time.

Defendant argues that the trial court's concern that allowing Salazar to be questioned on the Farfan incident would result in undue consumption of time was not well-founded because the trial was in fact finished several months earlier than estimated. The argument is not persuasive. "Undue consumption of time" refers not only to the time used to try the case, but also the time lost to the court by giving one case more time than needed, to the prejudice of other cases which could have productively used the time wasted. Here, the trial took five months of the court's time. Giving this case more time than was reasonably necessary was prejudicially taking off time from other cases that needed judicial attention just as well.

Defendant's reliance on *In re Anthony P.* (1985) 167 Cal.App.3d 502, 213 Cal.Rptr. 424 (*In re Anthony P.*), *United States v. Giovanelli* (2d Cir. 1991) 945 F.2d 479 (*Giovanelli*), *People v. Randle* (1982) 130 Cal.App.3d 286, 181 Cal.Rptr. 745 (*Randle*), and *People v. Babbitt* (1988) 45 Cal.3d 660, 248 Cal.Rptr. 69, 755 P.2d 253 (*Babbitt*), is misplaced. Those cases addressed distinguishable situations. *In re* ****235** Anthony P.* involved the scope of cross-examination about a racial bias, which is not an issue here; *Giovanelli* involved a prosecution in federal court of a defendant who had been acquitted in a state trial; *Randle* did not involve an Evidence Code section 352 issue at all; and *Babbitt* did not find that undue consumption of time was an appropriate factor to consider.

We are also not persuaded by defendant's argument that "the excluded evidence would have shown that the prosecution knowingly presented false or at least misleading testimony." The prosecution was ready to prove that Salazar was telling the truth had defendant been allowed to examine Salazar about the Farfan incident.

We conclude the trial court did not abuse its discretion in disallowing evidence relating to the Farfan homicide.

Cross-Examination of John Kracht

[10] Defendant contends the trial court violated his Sixth and Fourteenth Amendment rights to confrontation and due process by unduly restricting the scope of cross-examination of John Kracht regarding the disposition of a case against Pena, which would have shown that defendant had no motive to agree to kill Rosas and thus prejudiced his defense against the charges of murder and conspiracy to commit murder. We disagree.

***545** Rosas was murdered on June 26, 1991, by

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assailants who were not identified. The prosecution's evidence showed that defendant authorized Rosas's murder because Rosas had identified Pena as the person who had earlier robbed Petra Gonzalez, who was the mother of Rosas's girlfriend. The prosecution's evidence consisted of Pena's confession, statements made by several NF members, and evidence of the actual robbery itself wherein Gonzalez identified Pena to the police as one of the robbers. Gonzalez testified that two masked men broke into her home on December 31, 1983, and that Rosas went to her defense. Gonzalez did not know who Pena was and did not recall if Pena was one of the intruders.

John Kracht, the district attorney's investigator, testified that he used to be employed by the San Jose Police Department and that, while employed as such, he had investigated the Rosas robbery and had spoken to Gonzalez. Gonzalez identified Pena's picture as that of one of the robbers. Gonzalez also told Kracht that Pena had held a knife to her neck and had cut her.

During cross-examination, the defense asked Kracht whether his reports with reference to the Rosas robbery investigation were closed; whether he ever testified at a trial involving Pena regarding the Rosas robbery; and whether he ever appeared in court "with reference to charges brought against Pablo Pena as a result of this incident." The prosecution objected to the questions on relevancy grounds. The court sustained the objections. Trujeque's counsel requested a hearing on the defense objection. The court granted the request, and a hearing was held out of the presence of the jury.

At the hearing, the defense stated, as an offer of proof, that Pena was not prosecuted for the Rosas robbery, and this lack of prosecution showed that the prosecution's theory was not viable. The defense further stated that because Pena was not prosecuted, "there never was any way that [Pena] would know that anything happened."

The court ruled that the objected questions were irrelevant, and, in any event, the relevancy of the questions was "greatly outweighed by undue consumption of time on a collateral issue, really."

**236 [11] We find no error. Pursuant to Evidence Code section 210, "relevant evidence" is evidence that has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." Trial courts have wide discretion in determining the relevancy of evidence. (*Babbitt, supra,* 45 Cal.3d at p. 681, 248 Cal.Rptr. 69, 755 P.2d 253.)

The fact that was of consequence which the defense sought to establish with the challenged questions was the viability of the prosecution theory that *546 defendant authorized the murder of Rosas because Rosas had identified Pena as one of the robbers in the Rosas robbery. Defendant's argument is that such theory was not viable because Kracht's investigation of the Rosas robbery had been closed, and Kracht had not appeared in court in regard to any charges brought against Pena respecting the Rosas robbery.

We fail to see the logic of the argument. The closure of Kracht's investigation, and the fact that Kracht never appeared nor testified at a trial involving the Rosas robbery, did not mean that Rosas was without other means of knowing that Pena was involved in the Rosas robbery. Rosas's knowledge of Pena's participation could have come from sources other than Kracht's investigation or court testimony. In fact, Rosas was present when the robbery took place, and even went to the defense of Gonzalez. Pena, as one of the robbers, likely knew of Rosas's presence during the robbery and of Rosas's role in coming to the defense of Gonzalez. There is evidence that in late June 1991, defendant told Salazar that there was a "green light" on Rosas because Rosas had "snitched on Pablo Pena, Panther." Chavez testified that while he was in prison with Pena, Pena had told him that he (Pena) had robbed Rosas's home. There is also evidence that after Rosas's murder, Shelton asked defendant about it, and defendant's reply was: "Fuck that punk, I just told them [Chavez and Salazar] to deal with it, that he [Rosas] had some situation with Panther [Pena]."

Because the questions of whether Kracht had closed his investigation and whether he had appeared or testified at a trial involving the Rosas robbery did not foreclose the prosecution theory that defendant had authorized the murder of Rosas because Rosas knew that Pena was involved in the Rosas robbery, the trial court did not exceed the bounds of reason, and therefore did not exceed its discretion, in

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sustaining the prosecution's objections to the challenged cross-examination questions on relevancy grounds.

Moreover, the trial court stated that, in any event, the relevancy of the questions was "greatly outweighed by undue consumption of time on a collateral issue." Defendant has not seriously challenged this Evidence Code section 352 determination by the trial court, except to point out that only two questions were objected to. It is not possible to tell, however, how many more questions on the subject might have been asked, and how much more time might have been spent by both sides on the issue, had no timely objections been made to the initial questions, and had not the trial court sustained the objections.

Lesser Included Offense Instruction

Defendant contends the trial court violated defendant's state and federal constitutional rights to due process and an impartial jury trial by *547 refusing to instruct the jury on the lesser included offense of second degree murder with respect to the conspiracy to commit murder in count 1 and the murder of Rosas in count 12. The contention is without merit.

**237 [12] As to count 1, defendant did not request below that the jury be instructed on conspiracy to commit second degree murder, but claims on appeal that the trial court had the sua sponte duty to give such instruction. The court had no such duty, and the issue is now settled. In *People v. Cortez* (1998) 18 Cal.4th 1223, 1237-1238, 77 Cal.Rptr.2d 733, 960 P.2d 537, the California Supreme Court held that "all conspiracy to commit murder is necessarily conspiracy to commit premeditated and deliberated first degree murder, and that all murder conspiracies are punishable in the same manner as murder in the first degree pursuant to the punishment provisions of Penal Code section 182. The time has come to disapprove our early decision in [*People v.*] *Horn* [(1974)] 12 Cal.3d 290, 115 Cal.Rptr. 516, 524 P.2d 1300, to the extent it is inconsistent with the views expressed herein."

[13] As to count 12, the Rosas murder, defendant requested the trial court to instruct the jury on second degree murder. The prosecution objected, arguing that, as to that murder, defendant was either guilty of conspiracy to commit first degree murder or not guilty of any crime. The court denied defendant's request, stating: "As it relates to Mr. Vargas, ... it's either a first degree murder or it's not a first degree murder. I expect--or based on what I've observed during the course of this trial, that the credibility of witnesses who will testify about Mr. Vargas will be attacked. The argument is going to be he didn't commit any crime. To the extent he did, the evidence suggests in my opinion that if there was a crime, it's a first degree murder. Therefore, I don't believe it's appropriate to instruct on second degree murder."

As the court expected, defendant's counsel subsequently argued to the jury that defendant was not guilty at all of the Rosas homicide.

The trial court's duty to instruct on lesser included offenses has been summarized, thus: " 'It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.' [Citation.] That obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation] but not when there is no evidence that the offense was less than that charged. [Citations.] The obligation to instruct on lesser *548 included offenses exists even when as a matter of trial tactics a defendant not only fails to request the instruction but expressly objects to its being given. [Citations.] Just as the People have no legitimate interest in obtaining a conviction of a greater offense than that established by the evidence, a defendant has no right to an acquittal when that evidence is sufficient to establish a lesser included offense. [Citation.]" (*People v. Sedeno* (1974) 10 Cal.3d 703, 715-716, 112 Cal.Rptr. 1, 518 P.2d 913, fn. omitted.)

Further, " ' "[i]t has long been settled that the trial court need not, even if requested, instruct the jury on the existence and definition of a lesser and included offense if the evidence was such that the defendant, if guilty at all, was guilty of something beyond the lesser offense." [Citations.]' [Citation.]"

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(*People v. Guertin* (1996) 47 Cal.App.4th 505, 507, 54 Cal.Rptr.2d 821.)

**238 Defendant claims that he acted rashly, and therefore without deliberation or premeditation, when he approved the Rosas murder. The claim is not supported by the facts on record.

The record shows that in late June 1991, defendant told Salazar that there was a "green light" on Rosas because Rosas had "snitched on Pablo Pena, Panther." However, before the green light was executed, defendant wanted confirming "paperwork" because if Rosas was killed and defendant was wrong, defendant would himself be killed. Chavez testified that on the night Rosas was killed, he received a telephone call from Roy Reveles and Tim Hernandez asking him for authority "[t]o hit Little Eli [Rosas]." Chavez told Hernandez that he "didn't have the authority to make any decisions." Chavez then contacted Salazar, who contacted defendant. In a three-way telephone discussion with Salazar and defendant, Chavez told defendant that Reveles and Hernandez had asked for his authority to kill Rosas and that he had told them that he "couldn't make that decision." Chavez asked defendant what he was to do. Defendant told Chavez to "do what you got to do," which meant to "kill [Rosas]."

This three-way telephone conversation took place while defendant was at the home of Michelle Valderama, his sister-in-law. Valderama overheard defendant's side of the conversation, including the name "Eli," which was how Rosas was called, and defendant's instruction to the caller to "just do what you got to do," and for the caller to let him know what happened.

Subsequently, when defendant and Shelton were at San Quentin, defendant told Shelton, in referring to Rosas: "Fuck that punk, I just told them [Chavez and Salazar] to deal with it, that he [Rosas] had some situation with Panther [Pena]," and that Rosas was behind "some drug deal that some drugs *549 were involved and that [Rosas] had supposedly had snitched on [Pena] who's also an N.F. member."

The foregoing facts demonstrate premeditation and deliberation, not rashness. If the jury accepted the facts as true, the killing of Rosas was murder of the first degree. If the jury did not believe the foregoing evidence, particularly that relating to the three-way conversation among defendant, Chavez, and Salazar, then defendant was not guilty of any crime. There was no middle ground.

Accordingly, we conclude the trial court did not err in refusing to give the second degree murder lesser included offense instruction.

One or Multiple Conspiracies

Defendant contends the trial court deprived defendant of his state and federal constitutional rights to a trial by jury and due process by failing to instruct the jury to determine the essential factual question whether one or multiple conspiracies existed. We disagree.

On conspiracy, the defense proposed a modified version of CALJIC No. 6.10, to read as follows: "If you find the existence of a conspiracy beyond a reasonable doubt, you must determine whether a single or multiple conspiracies have been proven. If there was one overall agreement among the various parties to perform various functions to carry out the objectives of the conspiracy, then there is but a single conspiracy. If there were separate agreements each of which had its own distinct, illegal end and which were not drawn together in a single, overall, comprehensive plan, then each such agreement is a separate conspiracy. [¶] The indictment alleges only a single count of conspiracy. If you find the existence of multiple conspiracies, **239 a defendant may be found guilty of conspiracy if the proof shows beyond a reasonable doubt that he participated in one or more of the conspiracies. However, to find a defendant guilty of conspiracy you must unanimously agree as to which conspiracy or conspiracies he participated in. It is not necessary that the particular conspiracy or conspiracies agreed upon be stated in your verdict."

The prosecution objected to this proposed instruction, arguing that while there was one umbrella conspiracy, which was the NF, "there have to be some specific efforts on the part of each conspirator to join in that conspiracy as a--if you would like, a mini conspiracy within the ambit of the larger one. Obviously, the larger one is the [Nuestra Familia] doing evil things as a group, but we have never gone so far as to say that simply joining *550 the NF makes one responsible for all of the crimes then committed by the gang itself,

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necessarily. But in terms of the umbrella conspiracy and for [Evidence Code section] 1223 there is such an umbrella conspiracy to commit crimes, the named crimes in general. But that's why in terms of the verdict form and also the accomplice stuff and all of the rest of it, we have specific murder object, object crimes, that is, the murder of certain specific individuals. The subjects of the object crimes, if you will."

The court refused the proposed instruction, stating that it found the last two paragraphs thereof, which deal with multiple conspiracies, "potentially very confusing,"

The next day, the court announced: "... I've rethought my position. As you know, I've indicated before that I felt that the jury would not only have to find unanimously which of the target crimes were the subject of the conspiracy, but I went on to indicate that I felt they would have to be unanimous as to which particular event associated with the target crimes, for example, which murder. And in keeping with that position, I felt that the jury verdict forms should be specific as to possible victims, where they could not only demonstrate their unanimous opinion concerning the target crime, but which particular event. [¶] After reconsidering, I've come to the conclusion I was wrong. And it's my opinion that the jury need only be unanimous about the target crimes, that they don't have to unanimously agree as to which event, nor does that have to be reflected in the jury verdict form, whether it be which murder or which robbery or which distribution of controlled substances. [¶] I am not inclined, still, to give the instructions requested by the defense dealing with multiple conspiracies, and the record is clear as to the proposed instructions which I rejected already."

The court then gave the jury the following instruction on conspiracy (CALJIC No. 6.10): "A conspiracy is an agreement entered into between two or more persons with the specific intent to agree to commit an object crime or crimes and with the further specific intent to commit the object crime or crimes followed by an overt act committed in this state by one or more of the parties for the purpose of accomplishing the object or objects of the agreement. Conspiracy is a crime. [¶] In order to find a defendant guilty of conspiracy, in addition to proof of the unlawful agreement and specific intent, there must be proof of the commission of at least one of the acts alleged in the indictment to be an overt act and that the act committed was an overt act. It is not necessary to the guilt of any particular defendant that defendant personally committed the overt act, if he was one of the conspirators when the alleged overt act was committed. [¶] The term 'overt act' means any step taken or act committed by one or more of the conspirators**240 *551 which goes beyond mere planning or agreement to commit a crime and which step or act is done in furtherance of the accomplishment of the object of the conspiracy. [¶] To be an 'overt act,' the step taken or act committed need not, in and of itself, constitute the crime or even an attempt to commit the crime which is the ultimate object of the conspiracy. Nor is it required that the step or act, in and of itself, be a criminal or an unlawful act."

The jury was also instructed pursuant to CALJIC No. 6.25: "In order to find a defendant guilty of the crime of conspiracy, you must find beyond a reasonable doubt that a defendant conspired to commit one or more of the object crimes of the conspiracy, and you also must unanimously agree as to which particular crime or crimes he conspired to commit. [¶] If you find defendant guilty of conspiracy, you will then include a finding on the question as to which alleged object crimes you unanimously agree a defendant conspired to commit. A form will be supplied for that purpose for each defendant."

In addition, because of the allegation in the indictment that the conspiracy was committed for the benefit of a criminal street gang, the court instructed the jury that "[i]f you find a defendant guilty of any crime charged, then you must decide if he committed that crime or those crimes for the benefit of, at the direction of, or in association with a criminal street gang."

Defendant argues that the question of whether one or more conspiracies existed in this case was a question of fact for the jury to determine, and, therefore, the trial court violated his state and federal constitutional rights to a trial by jury and due process when that court refused his request to instruct the jury to "determine whether a single or multiple conspiracies had been proven, and to agree unanimously as to which conspiracy or conspiracies each defendant participated in." We disagree.

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In *People v. Tran* (1996) 47 Cal.App.4th 759, 772, 54 Cal.Rptr.2d 905, this court stated: " 'The crime of conspiracy is defined in the Penal Code as "two or more persons conspir[ing]" "[t]o commit any crime," together with proof of the commission of an overt act "by one or more of the parties to such an agreement" in furtherance thereof. [Citation.] "Conspiracy is a 'specific intent' crime.... The specific intent required divides logically into two elements: (a) the intent to agree, or conspire, and (b) the intent to commit the offense which is the object of the conspiracy.... To sustain a conviction for conspiracy to commit a particular offense, the prosecution must show not only that the conspirators intended to agree *but also that they intended to commit the elements of that offense.*" [Citation.]' [Citation.]" (Original italics.)

***552** In a conspiracy, "[t]he gist of the offense is the unlawful agreement between the conspirators to do an act contrary to law, accompanied by an overt act to at least start to carry the conspiracy into effect." (*People v. Moran* (1958) 166 Cal.App.2d 410, 414, 333 P.2d 243.) In *People v. Lopez* (1994) 21 Cal.App.4th 1551, 1557, 26 Cal.Rptr.2d 741, the court, quoting 1 Witkin and Epstein, California Criminal Law (2d ed. 1988) Elements of Crime, section 163, at page 181, stated that " '[o]ne agreement gives rise to only a single offense, despite any multiplicity of objects.' "

In *Braverman v. United States* (1942) 317 U.S. 49, 53-54, 63 S.Ct. 99, 87 L.Ed. 23 (*Braverman*), where the defendants were charged with the illegal manufacture, transportation and distribution of liquor, and each count charged a conspiracy to violate a different penal statute, and where it was conceded that the different violations were all pursuant to a single overall ****241** agreement, the United States Supreme Court concluded that there was only one conspiracy, reasoning: "The gist of the crime of conspiracy as defined by the statute is the agreement or confederation of the conspirators to commit one or more unlawful acts 'where one or more of such parties do any act to effect the object of the conspiracy.' The overt act, without proof of which a charge of conspiracy cannot be submitted to the jury, may be that of only a single one of the conspirators and need not be itself a crime. [Citations.] But it is unimportant, for present purposes, whether we regard the overt act as a part of the crime which the statute defines and makes punishable, [citation], or as something apart from it, either an indispensable mode of corroborating the existence of the conspiracy or a device for affording a *locus poenitentiae,* [citations]. [¶] For when a single agreement to commit one or more substantive crimes is evidenced by an overt act, as the statute requires, the precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects. Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one. [¶] The allegation in a single count of a conspiracy to commit several crimes is not duplicitous, for 'The conspiracy is the crime, and that is one, however diverse its objects.' [Citations.] A conspiracy is not the commission of the crime which it contemplates, and neither violates nor 'arises under' the statute whose violation is its object. [Citations.] Since the single continuing agreement, which is the conspiracy here, thus embraces its criminal objects, it differs from successive acts which violate a single penal statute and from a single act which violates two statutes. [Citations.] The single agreement is the prohibited conspiracy, and however diverse its objects it violates but a single statute.... For such a violation, only the single penalty prescribed by the statute can be imposed."

[14] ***553** Here, the prosecution charged defendant with only one count of conspiracy. Assuming that more conspiracy counts could have been charged under the facts, the decision to charge defendant with only one conspiracy count was a prosecutorial charging discretion that we do not review. The exercise of that discretion involves questions of prosecutorial policies and judgment, not questions of fact for the jury to determine.

[15] Moreover, we fail to see how charging defendant with one count of conspiracy, instead of multiple counts, could prejudice defendant. Any error would therefore be harmless.

Furthermore, assuming there were multiple conspiracies, we do not see how the existence of the uncharged conspiracies can result in the reversal of a guilty finding in the one conspiracy that was

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charged. If the evidence submitted to the jury supports the guilty finding on the charged conspiracy, the fact that the same evidence might also have supported other conspiracies, which were not charged, is of no consequence to the issue of innocence or guilt on the charged conspiracy.

[16] In fact, the record evidence points only to one conspiracy--the agreement to establish the NF as a criminal gang to commit murder, robbery, burglary, extortion, and drug trafficking, among other crimes. Within that umbrella conspiracy were sub-conspiracies to commit specific crimes. However, the commission of the specific crimes, and the drawing up of **242 plans required to commit them, were all in pursuance of the overriding purpose of the NF, which was to establish power through the use of crime, force, and fear, and to use that power to further strengthen and perpetuate itself by killing its enemies, raising money for the gang, and instilling obedience and discipline among its members by killing members who break its rules. Thus, Rosas was killed because he had "snitched on Pablo Pena, Panther." The decision to kill Rosas, being one in furtherance of the overriding purpose of the conspiracy, was part of the overall conspiracy, and hence cannot be the basis for filing a separate charge of conspiracy.

It has been held that the overall scheme need not be complete in all its aspects at the time it is formed. (*United States v. Becker* (5th Cir.1978) 569 F.2d 951, 959.) "A conspiracy is not necessarily a single event which unalterably takes place at a particular point in time when the participants reach a formal agreement; it may be flexible, occurring over a period of time and changing in response to changed circumstances." (*People v. Jones* (1986) 180 Cal.App.3d 509, 517, 225 Cal.Rptr. 697.) "The general test is whether there was 'one overall agreement' to perform various functions to achieve the objectives of the conspiracy. [Citation.] Performance of *554 separate crimes or separate acts in furtherance of a conspiracy is not inconsistent with a 'single overall agreement.' [Citation.] The general test also comprehends the existence of subgroups or subagreements." (*United States v. Zemek* (9th Cir.1980) 634 F.2d 1159, 1167 (*Zemek*).)

[17][18] Because the Rosas murder did not provide evidence of a conspiracy separate from the overriding NF conspiracy, it did not support defendant's request for multiple conspiracies instruction. A trial court is required to instruct the jury to determine whether a single or multiple conspiracies exist only when there is evidence to support alternative findings. (*People v. Skelton* (1980) 109 Cal.App.3d 691, 717, 167 Cal.Rptr. 636 (*Skelton*); *United States v. Heath* (10th Cir.1978) 580 F.2d 1011, 1022.)

In *Zemek,* the Ninth Circuit applied a four-factor analysis to determine whether the crimes were committed pursuant to an overall scheme. These factors are: (1) the nature of the scheme; (2) the identity of the participants; (3) the quality, frequency, and duration of each conspirator's transactions; and (4) the commonality of times and goals. (*Zemek, supra,* 634 F.2d at p. 1167.)

[19] We are not pointed to any California case adopting the *Zemek* factors, nor has our own research disclosed such a case. Nonetheless, even applying the *Zemek* factors, as defendant suggests we do, we find in the record no convincing evidence to support defendant's claim of multiple conspiracies.

First, on the nature of the scheme, NF was organized primarily as a prison gang. However, it also functioned on the streets, engaging in various criminal activities. NF's basic purpose was to make money through crime for its members in and out of prison. NF members pledge allegiance to act in concert and to commit crimes, including murder, for the gang. NF has a written constitution, and its rules require the members to cover up each other's crimes. The only way to get out of the gang is to die, be killed, or be a dropout/snitch. NF's rule is "blood in, blood out," which means that one becomes a member of NF by spilling blood, preferably by killing, and leaves the gang by being killed as a coward, traitor, or deserter. A member may be killed by the gang for refusal to follow a superior's orders, or for failure to attend meetings.

**243 On the identity of participants, members participate in whatever criminal activities their superiors order them to do. There is common overlapping of crime assignments.

On the quality of the frequency and duration of a conspirator's transactions, the members are

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committed to each other in a continuing relationship *555 forged by the bond of "blood in, blood out." NF's written constitution provides for a ranking system where those in higher ranks issue orders to those in lower ranks, and where the penalty for disobeying the orders of a superior is death.

On the commonality of time and goals, the time period for the conspiracy in this case was two and a half years. The goals of the gang, which included making money for its members in and out of prison through criminal activities, such as murder, robbery, and drug trafficking, were shared by all the members.

The four *Zemek* factors to distinguish a single conspiracy from multiple conspiracies all point to a single conspiracy in this case.

[20] We conclude the trial court's instructions were consistent with the law on conspiracy, which is that a single agreement to commit a number of crimes is only one conspiracy, regardless of the number of crimes sought to be committed, or that are committed, under that conspiracy.

Defendant's reliance on *People v. Morocco* (1987) 191 Cal.App.3d 1449, 237 Cal.Rptr. 113 (*Morocco*), *Skelton, supra,* 109 Cal.App.3d 691, 167 Cal.Rptr. 636, and *People v. Liu* (1996) 46 Cal.App.4th 1119, 54 Cal.Rptr.2d 578 (*Liu*), is misplaced.

In *Morocco,* the defendant was charged with, and convicted of, two counts of solicitation to commit murder. The victims were husband and wife. The court, applying principles of conspiracy law to determine whether the defendant was guilty of one or two solicitations, struck the defendant's second conviction because the evidence showed that although there were two victims, there was only one plan encompassing the killing of both victims. If anything, therefore, *Morocco* supports the single conspiracy determination in this case. (*Morocco, supra,* 191 Cal.App.3d at p. 1454, 237 Cal.Rptr. 113.)

In *Skelton,* the court in fact reiterated the rule that "[t]he test is whether there was one overall agreement among the various parties to perform various functions in order to carry out the objectives of the conspiracy. If so, there is but a single conspiracy. [Citation.]" (*Skelton, supra,* 109 Cal.App.3d at p. 718, 167 Cal.Rptr. 636.) *Skelton* further held that "[a] judgment will not be reversed on the ground that two separate conspiracies were charged as one, unless the appellant shows that he was prejudiced thereby. [Citations.]" (*Id.* at pp. 718-719, 167 Cal.Rptr. 636.) We have discussed, *ante,* that defendant was not prejudiced by the finding of a single conspiracy in this case.

In *Liu,* the defendant was convicted of two counts of conspiracy to commit murder, and sought the reversal of one conviction, arguing that he should be *556 convicted of only one conspiracy, which is the converse of the situation here where the trial court found only one conspiracy and defendant claims there were multiple conspiracies. The *Liu* court affirmed the two convictions, but that was because it did not find an overriding conspiracy subsuming the two murders. Instead, it found that "[e]ach separately planned murder is the goal of a separate conspiracy." (*Liu, supra,* 46 Cal.App.4th at p. 1133, 54 Cal.Rptr.2d 578.) *Liu* in fact recognized the rule that "the test of whether or not [the conspirators] have formed a single conspiracy is whether the acts were merely steps or stages in the formation of a **244 larger and ultimately more general, all-inclusive conspiracy directed at achieving a single unlawful result. [Citation.] Under this rule, where the evidence shows that a group of conspirators agreed to commit a number of different crimes incidental to a single objective, there is only one conspiracy, and convictions for multiple conspiracies cannot be sustained. [Citation.]" (*Ibid.*)

We conclude the trial court did not err in failing to instruct the jury to determine whether one or multiple conspiracies existed in this case.

Unanimity Instruction

Defendant contends he was deprived of his Sixth and Fourteenth Amendment rights to a jury trial and due process by the trial court's refusal to instruct the jury to unanimously agree on the facts underlying the elements of the conspiracy, an error that is reversible because it is impossible to determine whether the jury unanimously agreed as to whom defendant conspired to murder. We disagree.

There is a split of authority as to whether jury

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unanimity on at least one overt act is required for a conspiracy conviction. Some cases hold that the trial court need not instruct the jury that it must unanimously agree on a particular overt act charged in furtherance of the conspiracy. (See, e.g., *People v. Lopez* (1993) 20 Cal.App.4th 897, 904, 24 Cal.Rptr.2d 649; *People v. Godinez* (1993) 17 Cal.App.4th 1363, 1367, 22 Cal.Rptr.2d 164; *People v. Von Villas* (1992) 11 Cal.App.4th 175, 233-235, 15 Cal.Rptr.2d 112; *People v. Cribas* (1991) 231 Cal.App.3d 596, 611-612, 282 Cal.Rptr. 538.) These cases have adopted the rationale set forth in *People v. Jones, supra,* 180 Cal.App.3d at page 516, 225 Cal.Rptr. 697, that the overt act required for conspiracy merely constitutes the theory of the case rather than an essential element of the offense: " 'In a conspiracy, the agreement to commit an unlawful act is not criminal until an overt act is committed, but when this happens and the association becomes an active force, it is the *agreement,* not the *overt act,* which is punishable.... [Citations.]' [¶] Inasmuch as the overt act, though required to establish the existence of a conspiracy, is not an *557 actual element of the crime, it follows that the jury only need be unanimous in finding *an* overt act was done in furtherance of the conspiracy, not in finding a particular overt act was done.... Hence, the overt act is part of the 'theory' of the case, not an act constituting the offense." Accordingly, "a trial court need not instruct the jury they must unanimously agree as to the overt act done in pursuance of a conspiracy." (*Id.* at pp. 516-517, 225 Cal.Rptr. 697.)

Other cases hold that the commission of an overt act is an essential element of conspiracy. (*People v. Brown* (1991) 226 Cal.App.3d 1361, 1369, 277 Cal.Rptr. 309; *Feagles v. Superior Court* (1970) 11 Cal.App.3d 735, 739, 90 Cal.Rptr. 197.) As it is an essential element of the offense, the jury must unanimously agree on the overt act. (See *People v. Bratis* (1977) 73 Cal.App.3d 751, 763, 141 Cal.Rptr. 45; *People v. Rehman* (1967) 253 Cal.App.2d 119, 157-158, 61 Cal.Rptr. 65.)

In *People v. Jackson* (1996) 13 Cal.4th 1164, 56 Cal.Rptr.2d 49, 920 P.2d 1254 (*Jackson*), the jury was asked to make three special findings on the three acts which the prosecutor argued were in furtherance of the murder conspiracy with which the defendant was charged. The jury found that the defendant committed all three acts. On appeal, the defendant claimed that the use of the special findings form violated sections 1150 and 1152, as well as his constitutional rights. The Supreme Court disagreed, since the jury had rendered a general verdict. The high **245 court stated that "the use of special findings was a proper safeguard of defendant's right of due process, ensuring that the jury deliberating on a conspiracy charge agree unanimously on the same overt act or acts that are the basis of his culpability." (*Id.* at p. 1227, 56 Cal.Rptr.2d 49, 920 P.2d 1254.) The Supreme Court added in a footnote that "[w]hile recognizing that special findings may be used to secure jury unanimity on a defendant's commission of overt acts in connection with a conspiracy, we take no position on the question whether a defendant is *entitled* to a unanimity instruction in a conspiracy trial." (*Id.* at p. 1227, fn. 15, 56 Cal.Rptr.2d 49, 920 P.2d 1254, original italics.)

We believe that not requiring unanimity is the better and more logical view. As we quoted earlier from *Braverman, supra,* 317 U.S. at pages 53-54, 63 S.Ct. 99: "The gist of the crime of conspiracy ... is the agreement or confederation of the conspirators to commit one or more unlawful acts 'where one or more of such parties do any act to effect the object of the conspiracy.' The overt act, without proof of which a charge of conspiracy cannot be submitted to the jury, may be that of only a single one of the conspirators and need not be itself a crime. [Citations.] ... [¶] For when a single agreement to commit one or more substantive crimes is evidenced by an overt act, as the statute requires, the precise nature and *558 extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects. Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one. [¶] The allegation in a single count of a conspiracy to commit several crimes is not duplicitous, for 'The conspiracy is the crime, and that is one, however diverse its objects.' [Citations.] *A conspiracy is not the commission of the crime which it contemplates,* and neither violates nor 'arises under' the statute whose violation is its object. [Citations.] Since the single continuing agreement, which is the conspiracy here, thus

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embraces its criminal objects, it differs from successive acts which violate a single penal statute and from a single act which violates two statutes. [Citations.] The single agreement is the prohibited conspiracy, and however diverse its objects it violates but a single statute." (Italics added.)

[21] Because the agreement is the conspiracy, the diversity of the crimes that may be the object of the agreement should be of little, if any, consequence. Proof that the agreement has crime as its object should be enough. So long as there is unanimity that crime was the object of the agreement, conspiracy is established regardless of whether some jurors believe that crime to be murder and others believe that crime to be something else. "A requirement of jury unanimity typically applies to acts that could have been charged as separate offenses." (*People v. Beardslee* (1991) 53 Cal.3d 68, 92, 279 Cal.Rptr. 276, 806 P.2d 1311.) As stated in *Stoner v. Williams* (1996) 46 Cal.App.4th 986, 997, 54 Cal.Rptr.2d 243: "[I]f only one criminal offense could exist as a result of the commission of various acts, the jury need not agree on which particular act (or legal theory) a criminal conviction is based, provided the jurors unanimously agree that all elements of the criminal offense are proved beyond a reasonable doubt."

To the same effect was the statement in *People v. Davis* (1992) 8 Cal.App.4th 28, 34, 10 Cal.Rptr.2d 381 (*Davis*): "It matters not that jurors may disagree over the **246 theory of the crime, for example, whether the situation involves felony murder or premeditated murder. Nor does it matter that they disagree on the theory of participation, for example, whether there was direct participation or aiding and abetting or coconspiracy. Nor does it matter that they disagree about the facts proving any of these theories. If each juror concludes, based on legally applicable theories supported by substantial evidence, that the defendant is guilty of the charged offense, the defendant is properly found guilty even if the jurors disagree about the particular theories or facts."

*559 *Davis* went on to say: "In California it is unnecessary jurors unanimously agree on the theory of criminal culpability supporting their unanimous conclusion of guilt.... [¶] ... [¶] ... [W]here there is a single offense and a single charge, it is the task of each juror to conclude, based perhaps on very different theories, whether the defendant is guilty or not guilty. It is simply of no consequence that some jurors believe the defendant is guilty based on one theory while others believe he is guilty on another even when the theories may be based on very different and even contradictory conclusions concerning, for example, the defendant's basic intent in committing the crime." (*Davis, supra,* 8 Cal.App.4th at pp. 44-45, 10 Cal.Rptr.2d 381.)

In *People v. Santamaria* (1994) 8 Cal.4th 903, 918-919, 35 Cal.Rptr.2d 624, 884 P.2d 81 (*Santamaria*), the California Supreme Court explained: "It is settled that as long as each juror is convinced beyond a reasonable doubt that defendant is guilty of murder as that offense is defined by statute, it need not decide unanimously by which theory he is guilty. [Citations.] More specifically, the jury need not decide unanimously whether defendant was guilty as the aider and abettor or as the direct perpetrator. [Citations.] This rule of state law passes federal constitutional muster. [Citation.] [¶] ... [¶] Not only is there no unanimity requirement as to the theory of guilt, the individual jurors themselves need not choose among the theories, so long as each is convinced of guilt. Sometimes, as probably occurred here, the jury simply cannot decide beyond a reasonable doubt exactly who did what. There may be a reasonable doubt that the defendant was the direct perpetrator, and a similar doubt that he was the aider and abettor, but no such doubt that he was one or the other."

Santamaria cited the following example to emphasize the rule: "In analyzing the unanimity question in a robbery case, one Court of Appeal used this example. ' "Assume a robbery with two masked participants in a store, one as the gunman and one as the lookout. If one witness makes a voice identification of the defendant as the gunman who demanded money, but other evidence, such as a fingerprint, suggests the defendant was actually holding the door open as lookout, the jury would be faced with the same theories presented in this case: find the defendant was the gunman and therefore a direct perpetrator, or find he was at the door and therefore an aider and abettor. Either way he would be guilty of robbery." If 12 jurors must agree on the role played by the defendant, the defendant may go free, even if the jurors all agree defendant committed the crime. That result is

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absurd.' [Citation.] Equally absurd would be to let the defendant go free because each individual juror had a reasonable doubt as to his exact role." (*Santamaria, supra,* 8 Cal.4th at p. 920, fn. 8, 35 Cal.Rptr.2d 624, 884 P.2d 81.)

Even before *Santamaria,* the California Supreme Court had already observed: "If [defendant] intended that only possession of the property should *560 pass at the time **247 of the sale, defendant was guilty of larceny by trick or device, but if [defendant] intended that title should pass, defendant was guilty of obtaining property by false pretenses. [Citations.] Irrespective of [defendant's] intent, however, defendant could be found guilty of theft by one means or another, and since by the verdict the jury determined that he did fraudulently appropriate the property, it is immaterial whether or not they agreed as to the technical pigeonhole into which the theft fell. [Citations.]" (*People v. Nor Woods* (1951) 37 Cal.2d 584, 586, 233 P.2d 897.)

[22][23] Here, defendant was convicted of one conspiracy. The indictment described that conspiracy as a conspiracy to commit various crimes. Because any one of the crimes that was the object of the conspiracy was sufficient to establish the conspiracy, there were multiple theories upon which the prosecution could proceed. The existence of such multiple theories precluded a unanimity instruction. A unanimity instruction is inappropriate where multiple theories may provide the basis for a guilty verdict on one discrete criminal event. (*People v. Carpenter* (1997) 15 Cal.4th 312, 394, 63 Cal.Rptr.2d 1, 935 P.2d 708; *Davis, supra,* 8 Cal.App.4th at pp. 41, 45, 10 Cal.Rptr.2d 381.)

The case of *Richardson v. United States* (1999) 526 U.S. 813, 119 S.Ct. 1707, 143 L.Ed.2d 985 (*Richardson*), which defendant cites to us in a letter brief, is inapposite. In that case, the defendant was convicted of engaging in a continuing criminal enterprise under a federal criminal statute which forbids any person from "engag[ing] in a continuing criminal enterprise." The statute defines "continuing criminal enterprise" as involving a "violat[ion]" of drug statutes where "such violation is a part of a continuing series of violations." (*Id.* at p. 815, 119 S.Ct. 1707.) Construing the federal statute, the United States Supreme Court determined that the statutory phrase "series of violations" "create[s] several elements, namely the several 'violations,' in respect to *each* of which the jury must agree unanimously and separately." (*Id.* at pp. 817-818, 119 S.Ct. 1707, original italics.) Because each "violation" was an element of the crime, the jury had "to agree unanimously about which specific violations make up the 'continuing series of violations.' " (*Id.* at p. 815, 119 S.Ct. 1707.)

[24] Here, the specific crimes that constitute the object of the conspiracy are not elements of the conspiracy. Rather, they are the means by which the purpose of the conspiracy was to be achieved. Accordingly, the *Richardson* requirement of jury unanimity does not apply to them. (*Richardson, supra,* 526 U.S. at pp. 818-819, 119 S.Ct. 1707.)

Recently, in *People v. Russo* (2001) 25 Cal.4th 1124, 1128, 108 Cal.Rptr.2d 436, 25 P.3d 641, the California Supreme Court settled the *561 question of "whether the jury must unanimously agree on a specific overt act," by holding that "the jury need not agree on a specific overt act as long as it unanimously finds beyond a reasonable doubt that some conspirator committed an overt act in furtherance of the conspiracy."

We conclude the trial court did not err when it refused to instruct the jury that it must unanimously decide whom, if anyone, defendant conspired to murder.

[25] In any event, any error was invited. The record reflects that the prosecutor informed the court that it had prepared verdict forms that "sought to identify the targets for the conspiracy to commit murder," adding: "We still think there is an umbrella conspiracy and it's pretty obvious that there is. The NF is a group and they get together and they do all of these nefarious things. That's the object. But when **248 it comes down to the particular subject matter of who they're planning to murder, that's why we put in the specific subjects of that particular object, object crime, otherwise, we think that we're in trouble on appeal." The attorney for codefendant Lopez argued to the court that the jury should only have to specify which of the object crimes a defendant conspired to commit, not the specific victim of that object crime. The prosecutor repeated that he wished the verdict form to specify whom, if anyone, a defendant conspired to kill.

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The next day, counsel for Lopez objected to the prosecutor's proposed verdict, arguing that it was inconsistent to require specification for the target crime of murder and not for the other target crimes, which had more than one victim. Defendant joined Lopez's objection. The court, which had earlier agreed with the prosecution on what the verdict form should ask the jury to indicate, reversed itself and sustained defendant's and Lopez's objection, stating: "After reconsidering, I've come to the conclusion I was wrong. And it's my opinion that the jury need only be unanimous about the target crime, that they don't have to unanimously agree as to which event, nor does that have to be reflected in the jury verdict form, whether it be which murder or which robbery or which distribution of controlled substances."

Any error was therefore invited; consequently, defendant cannot complain. (*People v. Wickersham* (1982) 32 Cal.3d 307, 330, 185 Cal.Rptr. 436, 650 P.2d 311.)

Any error was also harmless. There is a split of authority on the proper standard for reviewing prejudice when the trial court fails to give a unanimity instruction. Some cases hold that the prejudice must be deemed harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, *562 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (*Chapman*). Other cases hold that the test is as enunciated in *People v. Watson* (1956) 46 Cal.2d 818, 836, 299 P.2d 243 (*Watson*), which is whether "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error."

[26][27] We think *Watson* provides the correct standard on the issue. That is because the requirement for jury unanimity in a criminal prosecution is a state constitutional requirement. (Cal. Const., art. I, § 16; *People v. Mickle* (1991) 54 Cal.3d 140, 178, 284 Cal.Rptr. 511, 814 P.2d 290; *People v. Adames* (1997) 54 Cal.App.4th 198, 207, 62 Cal.Rptr.2d 631.) The United States Supreme Court "has never held jury unanimity to be a requisite of due process of law. Indeed, the Court has more than once expressly said that '[i]n criminal cases due process of law is not denied by a state law ... which dispenses with the necessity of ... unanimity in the verdict.' " (*Johnson v. Louisiana* (1972) 406 U.S. 356, 359, 92 S.Ct. 1620, 32 L.Ed.2d 152 (*Johnson*).) In *Johnson,* the high court, in fact, held that in Louisiana criminal verdicts rendered by nine out of twelve jurors are valid. (*Id.* at p. 363, 92 S.Ct. 1620.) There being no right to a unanimous verdict under the United States Constitution, the question of whether defendant was entitled to a unanimity instruction is a state, not a federal, issue.

[28] In any event, the jury found defendant guilty of the murder of Rosas. On the record facts, which show that defendant's participation in the murder of Rosas was in authorizing the murder, and there being no evidence in the record that defendant actually participated in the murder, or, being present, aided and abetted in the commission thereof, the guilty verdict on defendant for the murder of Rosas could **249 only have been by reason of the jury unanimously finding that defendant had conspired to murder Rosas. Because of this implicit unanimous finding of conspiracy, it is not reasonably probable that defendant would have obtained a more favorable verdict had the unanimity instruction in question been given. For the same reason, any error was harmless even if the standard applied were the *Chapman* standard of harmless error beyond a reasonable doubt.

Urango and Esparza Incidents

Defendant contends he was deprived of his Sixth and Fourteenth Amendment rights to due process and notice of the allegations that he conspired to murder or assault both Urango and Esparza, where he did not learn of these allegations until four months into trial. We disagree.

[29] At the conclusion of the trial, the prosecution proposed a jury verdict form listing the conspiracy's potential victims. The list included Urango and *563 Esparza, whose names did not appear in the indictment as being involved in the alleged overt acts. Defendant objected to any reference to a conspiracy to murder Urango and Esparza, arguing that defendant did not have notice of those charges because there was no grand jury testimony given and no overt acts alleged that defendant had conspired to kill either Urango or Esparza, and that the only evidence connecting defendant to the Urango and Esparza incidents came up during Salazar's trial testimony. Defendant argues the inclusion of Urango and Esparza in the prosecutor's verdict form

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violated defendant's constitutional right to be informed of the nature of the charges against him.

In our discussion on the requirement of jury unanimity, we concluded that the target crimes, that is specific crimes that constitute the object of the conspiracy, are not elements of the conspiracy; rather, they are only the means by which the purpose of the conspiracy was to be achieved. Because the Urango/Esparza incidents were not an element of the charged conspiracy, the prosecutor's reference added nothing to what the jury needed to reach a finding of conspiracy. The outcome would have been the same.

[30] Consequently, any error was harmless, regardless of whether the standard of review applied is the *Chapman* standard of harmless error beyond a reasonable doubt, or the *Watson* standard of reasonable probability of a more favorable outcome.

Constitutional Vagueness

[31] Defendant contends his conviction for conspiracy to commit murder violates state and federal due process guarantees because a conspiracy to kill one of various persons without agreement upon who was to be killed is unconstitutionally vague and generic. The contention is without merit.

We have already determined that the trial court was not required to instruct the jury that it had to agree unanimously whom defendant conspired to kill. Such determination disposes of defendant's present contention, as well.

Defendant's reliance on *Suniga v. Bunnell* (9th Cir.1993) 998 F.2d 664 (*Suniga*) is misplaced. Due process was implicated in *Suniga* because there was in that case one theory of liability upon which the jury was instructed that did not exist in California law. We do not have such a situation here.

[32] ***564** In any event, any error was harmless because, as discussed, by finding ****250** defendant guilty of the murder of Rosas on the record facts, the jury had also to find unanimously that defendant had conspired to murder Rosas.

Sufficiency of Evidence

Defendant contends his conviction for conspiracy to commit murder must be reversed for constitutionally insufficient evidence because this court cannot determine whether or not the jury found him guilty of conspiring to kill a person for which conspiracy there is constitutionally sufficient evidence in support of conviction. The contention is without merit.

[33] Again, we have already determined that the jury was correctly instructed that it did not need to agree unanimously on which particular murder defendant conspired to commit so long as it unanimously agreed that defendant conspired to commit murder as the object of the conspiracy. The jury subsequently found defendant guilty of the Rosas murder. The guilty finding on the Rosas murder could have only been reached by a unanimous jury finding that defendant conspired to kill Rosas. That unanimous conspiracy finding was sufficient to support the guilty finding on the single conspiracy count.

[34] Moreover, where the jury is presented with several factual theories for conviction, some of which are predicated upon insufficient evidence, "the appellate court should affirm the judgment unless a review of the entire record affirmatively demonstrates a reasonable probability that the jury in fact found the defendant guilty solely on the unsupported theory." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1130, 17 Cal.Rptr.2d 365, 847 P.2d 45.) The Rosas murder conviction eliminates such a probability.

Withdrawal Instruction

[35] Defendant contends the trial court violated his state and federal constitutional rights to due process and a fair trial by jury by refusing to give the modified withdrawal instruction that he requested, which was supported by the evidence and which pinpointed the defense theory of the case. The contention is without merit.

Defendant requested the court to give a modified version of CALJIC No. 6.20, reading as follows: "Any member of a conspiracy may withdraw from and cease to be a party to the conspiracy, but [his][her] liability for the acts of [his] [her] co-conspirators continues until [he][she] effectively

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withdraws from the conspiracy. [¶] Withdrawal may be communicated by an affirmative act bringing home the fact of [his][her] withdrawal to [his][her] *565 companions. The affirmative act must be made in time for [his][her] companions to effectively abandon the conspiracy and in a way which would be sufficient to inform a reasonable person of the withdrawal. [¶] In order to effectively withdraw from a conspiracy, there must be an affirmative and bona fide rejection or repudiation of the conspiracy which must be communicated to the other conspirators of whom [he][she] has knowledge. [¶] If a member of a conspiracy has effectively withdrawn from the conspiracy [he][she] is not thereafter liable for any act of the co-conspirators committed subsequent to [his][her] withdrawal from the conspiracy, but [he][she] is not relieved of responsibility for the acts of [his][her] co-conspirators committed while [he] [she] was a member. [¶] If the evidence raises a reasonable doubt as to whether the defendant withdrew from the conspiracy, you must find that [he] [she] did withdraw."

The court refused defendant's request and gave instead the unmodified version of CALJIC No. 6.20 , as follows: "A member **251 of a conspiracy is liable for the acts and declarations of his co-conspirators until he effectively withdraws from the conspiracy or the conspiracy has terminated. [¶] In order to effectively withdraw from a conspiracy, there must be an affirmative and good faith rejection or repudiation of the conspiracy which must be communicated to the other conspirators of whom he has knowledge. [¶] If a member of a conspiracy has effectively withdrawn from the conspiracy he is not thereafter liable for any act of the co-conspirators committed after his withdrawal from the conspiracy, but he is not relieved of responsibility for the acts of his co-conspirators committed while he was a member."

Defendant argues that the requested modification should have been granted because without the requested modification "[t]he instruction given could be and probably was interpreted to require that withdrawal from a conspiracy be by oral communication," adding that "[t]his is not correct--one may withdraw from a conspiracy by an 'affirmative act' as well."

The flaw in the argument is that the unmodified version given by the court did not require, and could not be misinterpreted as requiring, that the withdrawal from the conspiracy had to be *orally* communicated to the coconspirators. As given, the instruction merely required that there be "an affirmative and good faith rejection or repudiation of the conspiracy which must be communicated to the other conspirators of whom he has knowledge." An "affirmative" act need not be oral. We do not see how the language of defendant's proposed instruction differed from the unmodified version in this regard since both versions used the word "affirmative," and the word "oral" did not appear in either version.

Moreover, defendant's proposed version created more problems than it attempted to solve. For example, defendant's version used the word "companions" for "coconspirators." "Companions" is a word without a settled *566 legal definition, and one with loose meaning. "Companions" are not necessarily "coconspirators" within the meaning of California's penal statutes. What exactly did defendant mean by "companions"? Defendant's proposed version did not define the term.

Defendant's proposed modification also provided that "[t]he affirmative act must be made in time for [his][her] *companions* to effectively abandon the conspiracy and in a way which would be sufficient to inform a *reasonable person* of the withdrawal." (Italics added.) The addition of the "reasonable person" standard to the instruction is highly questionable. Defendant has cited no authority requiring the use of such a standard.

We conclude the trial court did not err in rejecting defendant's proposed modification to CALJIC No. 6.20, and in giving CALJIC No. 6.20 to the jury without modification.

Prosecutorial Misconduct

Defendant contends the prosecutor committed prejudicial misconduct and deprived defendant of his state and federal constitutional rights to due process and a fair trial by making an inflammatory comment and ungrounded attack on defense counsel in closing argument. We disagree.

Prosecutors Charles Constantinides and Catherine Constantinides handled the prosecution in this case.

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At the closing argument, Mr. Constantinides delivered one part of the argument, and Ms. Constantinides delivered the other part. During her part of the prosecution's final argument, Ms. Constantinides addressed the jury, and the following colloquy transpired:

"MS. CONSTANTINIDES: ... There was one portion of Mr. Provini's argument **252 which Charles [Constantinides] did not address because I asked him not to because this is really my issue for two reasons. It's the part about the Beto Jasso hit, and then that letter that--or excuse me--that statement that Lopez makes that correctional officer Gabrielson overhears. Let me show you first what Mr. Provini said about that. [¶] This is what he said. He first pointed out to you that certainly you may decide that Bobby Lopez was part of a plan or conspiracy to kill Beto Jasso, he seems to have conceded that. But he continued and he made four statements on four consecutive pages that *seemed kind of personal.* [¶] First he told you that you should convict Lopez because you believe Robert Rios on that count. Don't convict because of some testimony by officer Gabrielson about a comment which after any kind of critical analysis becomes *obvious to probably any intelligent lawyer.* [¶] Those are his words. He went on to the next page to say: Don't *567 convict Bobby Lopez because of a fallacious argument put up on the chart. [¶] Then he said on the following page: I think it's *obvious to any lawyer who looks at this closely* or any lay person or any juror who looks at this. [¶] Then finally on the last page regarding this subject he says: So *anybody with any kind of powers of reasoning would understand.* [¶] Now, ladies and gentlemen, you'll recall that part of the Beto Jasso support that we gave you, that I gave you, that I put up on this machine and flashed it up not on the wall but rather on a screen was that comment by Beto Jasso. [¶] What is going on here? They teach you in law school, and I remember because I'm much closer to it than any other lawyer in this room, that if you can't argue regarding the facts, if the facts aren't any good, then you argue the law. If the law is not any good for your side, then you argue the facts. And if the facts and the law are no good for you, you just stand up and argue. [¶] Well, ladies and gentlemen, they don't ever teach you to dog out your opponent like that. What is going on here? Is it sexism? Is it racism?

"MR. PROVINI [counsel for codefendant Lopez]: Objection.

"MS. CONSTANTINIDES: It is ageism?

"MR. PROVINI: It's just a comment on the evidence.

"THE COURT: Overruled.

"MS. CONSTANTINIDES: What is going on here, ladies and gentlemen? The youngster, Mexican-American female prosecutor didn't blow it, and this is how she didn't blow it." (Italics added.)

Ms. Constantinides then proceeded to discuss the evidence to argue for guilty verdicts.

At the break, defendant moved for a mistrial on the ground that Ms. Constantinides's argument "injected gender bias and racial bias." The prosecution responded that "not only is there support in the record for the comments, but there was no timely objection. And it's certainly fair rebuttal." The court found the objection timely, but denied the motion for a mistrial.

[36] First, the contention is barred. In *People v. Montiel* (1993) 5 Cal.4th 877, 914, 21 Cal.Rptr.2d 705, 855 P.2d 1277, where trial counsel objected to the prosecutor's remarks, but did not additionally request an admonition that would have cured any harm, the court held: "[T]rial counsel failed to preserve a direct claim of misconduct because, although he objected to the *568 prosecutor's remarks, he did not also request an admonition that would clearly have cured any harm. [Citations.]"

Similarly, in *People v. Gionis* (1995) 9 Cal.4th 1196, 1215, 40 Cal.Rptr.2d 456, 892 **253 P.2d 1199 (*Gionis*), the court stated: "[A] reviewing court will not review a claim of misconduct in the absence of an objection and request for admonishment at trial. 'To preserve for appeal a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition; otherwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct.' [Citations.]"

Here, there is no showing that the claimed harm would not have been cured by an appropriate

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admonition.

[37] Second, we agree with the People that Ms. Constantinides's comments were fair rebuttal. The defense invited the rebuttal by making uncalled-for remarks about Ms. Constantinides's intelligence and competence. When the defense suggested that Ms. Constantinides was not intelligent enough because she could not see a point that was obvious to any intelligent lawyer, and because she failed to comprehend something that anybody with any kind of powers of reasoning could understand, the suggestion was personal, unnecessary, and derogatory, justifying a response to vindicate the prosecutor's wounded pride. The personal and professional hurt that Ms. Constantinides felt is evident from her explanation to the court: "From the beginning of the trial I've had to hold my tongue. I say that because when I was examining some witnesses very early on in the first week or so, I was up there and I was doing something with the witness, and Mr. Selvin objected. And on the record he said, I don't know if she knows the Evidence Code but this is improper. And then the court responded, well, no, actually I sustained your objection, and so now she's going about it a different way. And what I was doing was very proper. But it raised the specter early, early on. I don't know if she knows the Evidence Code. [¶] Well, what is that all about? I mean do I not know the Evidence Code? Why wouldn't I know that? Mr. Selvin would never say that about Mr. Constantinides, absolutely not. Why wouldn't he, because Mr. Constantinides has lots of experience maybe."

Having invited the rebuttal, the defense cannot complain.

[38] Third, assuming the comments were improper, they were not egregious enough to warrant reversal. " 'A prosecutor's rude and intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." [Citations.] But conduct by a *569 prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves " 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " [Citations.] Included within the deceptive or reprehensible methods we have held to constitute prosecutorial misconduct are personal attacks on the integrity of opposing counsel. [Citation.]' [Citation.]" (*Gionis, supra,* 9 Cal.4th at pp. 1214-1215, 40 Cal.Rptr.2d 456, 892 P.2d 1199.)

[39] Fourth, the prosecutor did not comment on the race, or sex, or age of defendant; rather, she commented on her own race, sex, and age, as they might have affected opposing counsel's, and the court's and jury's, regard for her. There is no showing in the record that the prosecutor's comments prejudiced defendant. " 'It is settled that a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] **254 It is also clear that counsel during summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature.' [Citation.] 'A prosecutor may "vigorously argue his case and is not limited to 'Chesterfieldian politeness' " [citation], and he may "use appropriate epithets warranted by the evidence." ' [Citations.]" (*People v. Wharton* (1991) 53 Cal.3d 522, 567-568, 280 Cal.Rptr. 631, 809 P.2d 290.)

Although the prosecutor's comments were not directly on the evidence, they pertained to how the evidence might be unfairly viewed by the jury because of her own supposed inability to understand and analyze the evidence correctly.

[40] Fifth, "[p]rosecutorial misconduct implies the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People v. Strickland* (1974) 11 Cal.3d 946, 955, 114 Cal.Rptr. 632, 523 P.2d 672.) "To establish prosecutorial misconduct, it is not necessary to show the prosecutor acted in bad faith, but it is necessary to show the right to a fair trial was prejudiced. [Citation.]" (*People v. Nguyen* (1995) 40 Cal.App.4th 28, 35-36, 46 Cal.Rptr.2d 840.) "What is crucial to a claim of prosecutorial misconduct is not the good faith *vel non* of the prosecutor, but the potential injury to the defendant." (*People v. Benson* (1990) 52 Cal.3d 754, 793, 276 Cal.Rptr. 827, 802 P.2d 330.) Defendant has not carried his burden in this regard.

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The case of *People v. Kirkes* (1952) 39 Cal.2d 719, 249 P.2d 1 (*Kirkes*), relied on by defendant for the proposition that it is misconduct to argue to *570 the jury facts which are not in evidence, is inapposite. The prosecutor in *Kirkes* implied a fact not in evidence to connect the defendant to the crime. Nothing in Ms. Constantinides's challenged statements connected defendant to the charges.

We conclude the challenged comments did not constitute prosecutorial conduct, and that, in any event, the issue is waived.

Section 654

[41] Defendant contends he was improperly sentenced to consecutive terms of 25 years to life for both the Rosas murder conviction and for the conspiracy to commit murder, in violation of section 654. The contention is without merit.

Section 654, subdivision (a), provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

In *Neal v. State of California* (1960) 55 Cal.2d 11, 18-19, 9 Cal.Rptr. 607, 357 P.2d 839, the court, interpreting this provision, stated: "The proscription of section 654 against multiple punishment of a single act, however, is not limited to necessarily included offenses. [Citations.] In *People v. Knowles* [1950] 35 Cal.2d 175, 187, 217 P.2d 1, we stated: 'If a course of criminal conduct causes the commission of more than one offense, each of which can be committed without committing any other, the applicability of section 654 will depend upon whether a separate and distinct act can be established as the basis of each conviction, or whether a single act has been so committed that more than one statute has been violated. If only a single act is charged as the basis of the multiple convictions, only one conviction can be affirmed, notwithstanding that the offenses are not necessarily included offenses. It is **255 the singleness of the act and not of the offense that is determinative.' ... [¶] Few if any crimes, however, are the result of a single physical act.... [¶] Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one."

With respect to conspiracy, the rule was well summarized in *People v. Ramirez* (1987) 189 Cal.App.3d 603, 615-616, 236 Cal.Rptr. 404 (fn. omitted), as follows: "Because of the prohibition against multiple punishment in section *571 654, a defendant may not be sentenced 'for conspiracy to commit several crimes and for each of those crimes where the conspiracy had no objective apart from those crimes. If, however, a conspiracy had an objective apart from an offense for which the defendant is punished, he may properly be sentenced for the conspiracy as well as for that offense.' [Citations.] Thus, punishment for both conspiracy and the underlying substantive offense has been held impermissible when the conspiracy contemplated only the act performed in the substantive offense [citations], or when the substantive offenses are the means by which the conspiracy is carried out. [Citation.] Punishment for both conspiracy and substantive offenses has been upheld when the conspiracy has broader or different objectives from the specific substantive offenses. [Citations.]"

Here, there is strong evidence that the NF, of which defendant was a member, conspired to kill not only Rosas, but other persons as well, in addition to the gang's overriding conspiracy discussed *ante*.

We conclude the trial court did not err in not applying section 654, and in sentencing defendant to consecutive life terms for the Rosas murder and the conspiracy to commit murder.

DISPOSITION

The judgment is affirmed.

BAMATTRE-MANOUKIAN and WUNDERLICH , JJ., concur.

91 Cal.App.4th 506, 110 Cal.Rptr.2d 210, 00 Cal. Daily Op. Serv. 6785, 2001 Daily Journal D.A.R. 8253

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George W. Kennedy, District Attorney
Charles Constantinides, Deputy (Bar No. 044195)
Catherine Pozos Constantinides, Deputy (Bar No. 148472)
70 West Hedding Street
San Jose CA 95110
Telephone: (408) 299-7400

Attorneys for The People

FILED
JUL 08 1996
COUNTY CLERK
BY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

v.

VINCENT ARROYO, aka CHENTE,
SANTOS BURNIAS, aka BAD BOY,
LEONEL CANO, aka LEO,
ANDREW CERVANTES, aka MAD DOG,
ANTHONY GUZMAN, aka CHICO,
JOSEPH HERNANDEZ, aka PINKY,
TIMOTHY HERNANDEZ, aka TIMO,
ALICE PEREZ LOMELIN,
BOBBY LOPEZ, aka SILENT,
CARLOS MENDOZA, aka GUSANO,
IRENE NIETO,
RAUL REVELES, aka ROY,
JERRY SALAZAR, aka CRIPPLE JERRY,
HERMINIO SERNA, aka SPANKIO,
MARTIN SERNA,
RONALD SHELTON, aka LUCKY,
CARMEN TRINIDAD,
JAMES TRUJEQUE, aka HUEVO,
EDDIE VARGAS, aka FLACO,
SHELDON VILLANUEVA, aka SKIP, and
CELESTE WILLIAMS, aka CELESTE DURAN,
Defendants.

NOS. 156285
167319
178566

THIRD
AMENDED
INDICTMENT

001369

COUNT 1

The Grand Jury of the County of Santa Clara, State of California, hereby accuses

VINCENT ARROYO,
SANTOS BURNIAS,
LEONEL CANO,
ANDREW CERVANTES,
ANTHONY GUZMAN,
JOSEPH HERNANDEZ,
ALICE PEREZ LOMELIN,
BOBBY LOPEZ,
CARLOS MENDOZA,
IRENE NIETO,
JERRY SALAZAR,
HERMINIO SERNA,
MARTIN SERNA,
RONALD SHELTON,
CARMEN TRINIDAD,
JAMES TRUJEQUE,
EDDIE VARGAS,
SHELDON VILLANUEVA, and
CELESTE WILLIAMS

of a felony, to wit, a violation of CALIFORNIA PENAL CODE SECTION 182.1 (CONSPIRACY TO COMMIT CRIME), in that on or about and between November 1, 1989, to the present, in the County of Santa Clara, State of California, the said defendants did conspire together and did conspire with certain other persons, to wit,

LESLIE JEAN ANTONIO, aka PINEAPPLE,
LOUIE AROCHA, aka ROACH,
DAVID CERVANTES, aka DC,

LOUIE CHAVEZ, aka DUMPTRUCK,
MICHELLE CRADER,
LISA CUEVAS,
JAMES ESPARZA, aka JOCKO,
VICTOR ESQUIBEL, aka SLEEPER,
YVONNE FARFAN, aka MOUSEY,
PETE GARCIA,
DANIEL GONZALES, aka NARIZ, aka BIG NOSE,
YVETTE GUILLEN,
JIMMY GUTIERREZ, aka CUCUY,
LORENZO GUZMAN, aka LENCHO,
SONIA LOYOLA,
EUDORO MENDOZA, aka BOXER, aka DORO,
GEORGE MENDOZA, aka LUCKY,
JAMES MEZA, aka CANDYMAN,
FELIPA PEREZ,
RAYMOND PEREZ, aka CHOCOLATE,
PABLO PINA, aka PANTHER,
GEORGE QUINONES, aka GQ,
JOE RAMIREZ, aka OG,
JOSEPH RAMIREZ, aka SMILEY JOE,
ALBERT REVELES,
DAVID REYES, aka SANTOS,
MARIBEL REYES, aka MARI,
FELIPA RIOS, aka BIRDY,
ROBERT RIOS, aka RABBIT,
ROLAND SALDIVAR, aka OSO, aka CUB,
EDDIE SANTIAGO, aka FLACO,
CLAUDIA SERNA,

JACQUELINE SERNA,
CARLOS TERRAZAS,
EDDIE THOMPSON, aka KINO,
CORNELIO TRISTAN, aka CORNY,
ALFONSO URANGO, aka HUERO,
JASON VASQUEZ, aka FLACO,
ROBERT VIRAMONTES, aka BROWN BOB, and
persons unknown,

to commit crimes, to wit,

MURDER (in violation of Penal Code section 187),
ROBBERY (in violation of Penal Code sections 211 and 212.5),
ASSAULT WITH A DEADLY WEAPON (in violation of Penal Code sections 245(a)(1) and 245(a)(2)),
EXTORTION (in violation of Penal Code section 518),
INTIMIDATION OF WITNESSES (in violation of Penal Code section 137),
POSSESSION OF A CONCEALABLE FIREARM BY A CONVICTED FELON (in violation of Penal Code section 12021)
DISTRIBUTION OF HEROIN (in violation of Health and Safety Code section 11352(a)),
DISTRIBUTION OF PCP (in violation of Health and Safety Code section 11379.5),
DISTRIBUTION OF COCAINE (in violation of Health and Safety Code section 11352(a)), and
DISTRIBUTION OF METHAMPHETAMINE (in violation of Health and Safety Code section 11379).

OVERT ACTS

In pursuance of said conspiracy and to effect its objects, the following Overt Acts were committed:

001372

(1) While he was in prison from November 1, 1989, through the April 19, 1990, Louie Chavez was ordered by Joseph Hernandez, Vincent Arroyo, and other ranking members of the Nuestra Familia to revitalize the gang's San Jose "regiment" and to accumulate funds for the regiment's bank.

(2) When Louie Chavez paroled from Pelican Bay State Prison to San Jose on April 19, 1990, he brought with him a hit list provided by members of the Mesa (the Nuestra Familia's ruling council) designating those persons whom the gang wanted murdered. The list included the name of Tony (Little Weasel) Herrera.

(3) During a Nuestra Familia meeting held in early, 1990, at the San Jose home of Lisa Cuevas, Andrew Cervantes announced that Tony Herrera was a threat to the gang. At the time Cervantes, a resident of Stockton, was the highest ranking gang member not in prison in Northern California.

(4) On July 4, 1990, at a location near Kelly Park in San Jose, Lorenzo Guzman stabbed Carlos Mejias in the abdomen. Guzman was assisted by Victor Esquibel, a Nuestra Familia member or associate. The attempted murder was intended as punishment for Mejias' actions in state prison several years before which had caused an unauthorized injury to a Nuestra Familia member.

(5) In the late summer of 1990, the Nuestra Familia held a meeting at the San Jose home of Lisa Cuevas and discussed ways of making money through organized criminal activity. In attendance were gang members Andrew Cervantes, Ronald Shelton, George Quinones, Jimmy Gutierrez, Robert Rios and Louie Chavez. Also present was potential recruit Sheldon Villanueva.

(6) During the late summer, 1990, meeting at Lisa Cuevas' home, Andrew Cervantes designated Ronald Shelton as commander of the Nuestra Familia's San Jose regiment. Louie Chavez was made Shelton's second-in-command.

(7) During the late summer, 1990, meeting at Lisa Cuevas' home, Andrew Cervantes, Jimmy Gutierrez and Louie Chavez left for a time to find James Trujeque. Later they returned with him. Trujeque was then berated for not properly attending to Nuestra Familia business.

(8) During the late summer of 1990, after he was placed in charge of the San Jose regiment, Ronald Shelton told gang members to work with Tony Herrera so that the gang could accumulate money through use of Herrera's substantial contacts in the illegal-drug trade.

(9) During a Nuestra Familia meeting in October, 1990, at Lisa Cuevas' home in San Jose, Ronald Shelton, Andrew Cervantes and other gang members discussed killing Herrera but decided against it for so long as Herrera remained useful to the gang.

(10) On or about November 17, 1990, Cervantes and other Nuestra Familia members from out of town met in San Jose with local Nuestra Familia members and affiliates, including Sheldon Villanueva.

(11) On November 19, 1990, Sheldon Villanueva was arrested at a residence in San Jose with a large quantity of drugs and money belonging to the Nuestra Familia. The circumstances of the arrest were such that gang members concluded that Tony Herrera had provided the police with information leading to Villanueva's whereabouts.

(12) During the evening of November 20, 1990, Alice Perez Lomelin paged the beeper which Tony Herrera carried with him.

(13) On the evening of November 20, 1990, on a street in front of a San Jose apartment building, Ronald Shelton and Bobby Lopez shot and killed Tony Herrera by firing eight bullets into his neck and head.

(14) On November 20, 1990, after killing Herrera, Bobby Lopez and Ronald Shelton took Herrera's pager from his body and destroyed it.

(15) On November 20, 1990, after killing Herrera, Ronald Shelton burned some clothing at the San Jose home of Sonia Loyola.

(16) On November 22, 1990, Ronald Shelton interrogated Gloria Benavidez, Tony Herrera's girlfriend, about what she had told police about her activities with Herrera on the day he was murdered.

(17) On November 22, 1990, on a public street in San Jose, Bobby Lopez helped burn an automobile which had been used in the murder of Tony Herrera.

(18) On or about November 28, 1990, Bobby Lopez reported by letter to Nuestra

Familia member Joseph Hernandez at Pelican Bay State Prison. The letter contained this coded reference: "Little ... Weasel ... is ... peddling ... daisies." ("Little Weasel" was the nickname of Tony Herrera.)

(19) Late in 1990, Bobby Lopez became second-in-command of the Nuestra Familia's San Jose regiment.

(20) From early December, 1990, through early April, 1991, Bobby Lopez met frequently at sites in and about San Jose with members of the Northern Structure, the Nuestra Familia's subsidiary organization. Topics included driveby shootings, the killing of enemies, and the accumulation of funds through drug-dealing, extortion and robbery.

(21) At a December, 1990, meeting in San Jose involving Bobby Lopez and several Northern Structure members, Lopez announced that Robert Jasso, a friend of the previously-murdered Tony Herrera, was "disrespecting" the Nuestra Familia and should therefore be killed.

(22) In early 1991, Bobby Lopez gave Louie Chavez' wife money with which to buy a Chevrolet Monte Carlo to be used for Nuestra Familia and Northern Structure activities.

(23) On or about February 9, 1991, Sheldon Villanueva "married" the Nuestra Familia and thereby became a member.

(24) In early 1991, at the instigation of Bobby Lopez, Lopez, Robert Rios and Jason Vasquez drove to "The Place" bar in San Jose in order to kill Robert Jasso. The plan was aborted when a police car unexpectedly arrived at the scene of the planned murder.

(25) In early 1991, Bobby Lopez found heroin in the shoe of Ray Perez. Lopez confronted Perez about his apparent use of heroin in violation of Nuestra Familia rules.

(26) In March or April of 1991, Bobby Lopez organized the retrieval from Salinas of several guns stolen during a burglary. He directed Northern Structure members Roland Saldivar and Alfonso Urango to transport the firearms from Salinas to the Santa Clara residence of Maribel Reyes.

(27) In early April of 1991, Ronald Shelton, Bobby Lopez, Robert Rios, Louie

Chavez, and Northern Structure members Jason Vasquez and Anthony Guzman met at the Santa Clara home of Maribel Reyes and discussed ways of accumulating funds by means of organized criminal activity.

(28) During the April, 1991, meeting at Maribel Reyes' home in Santa Clara, Ronald Shelton said that someone should "jack-up" Larry Valles, a drug dealer who, according to Shelton, was not paying a percentage of his profits to the Nuestra Familia.

(29) During the April, 1991, meeting at Maribel Reyes' home in Santa Clara, Ronald Shelton announced that Robert Jasso remained one of three priority murder targets.

(30) During the April, 1991, meeting at Maribel Reyes' home in Santa Clara, Ronald Shelton and Bobby Lopez distributed several firearms which Lopez had previously obtained in Salinas.

(31) In early April, 1991, Ronald Shelton confronted Ray Perez with his suspicions that Perez had been having an affair with Erma Garcia. Shelton considered Garcia to be his (Shelton's) girlfriend and therefore protected by Nuestra Familia rules from the sexual attentions of a brother gang member.

(32) On April 15, 1991, Ronald Shelton and Bobby Lopez confronted Larry Valles at the San Jose residence of Leslie Jean Antonio and demanded that Valles pay to the Nuestra Familia a portion of his drug-dealing profits.

(33) On April 15, 1991, in San Jose, Ronald Shelton and Bobby Lopez killed Larry Valles, by shooting him in the chest, neck and head.

(34) On April 15, 1991, at their residence in Santa Clara, Anthony Guzman and Irene Nieto burned clothing belonging to Ronald Shelton and Bobby Lopez.

(35) On or about April 15, 1991, Bobby Lopez disposed of a handgun by tossing it off a bridge.

(36) During May, 1991, Sheldon Villanueva, an inmate of the Santa Clara County Jail, investigated the whereabouts and status of Gabriel Coronado, a member of a rival gang from Fresno.

(37) In May, 1991, Bobby Lopez ordered Leonel Cano to kill Gabriel Coronado.

At the time Lopez, Cano and Coronado were inmates at the Santa Clara County Jail.

(38) On May 23, 1991, in the Santa Clara County Jail, Leonel Cano slashed Gabriel Coronado's neck with a tool made from razor blades. Coronado did not die.

(39) On June 26, 1991, Raul Reveles telephoned Louie Chavez and said that Elias Rosas had been "disrespecting" Nuestra Familia and Northern Structure members.

(40) On June 26, 1991, during a three-way telephone conversation with Louie Chavez and Jerry Salazar, Nuestra Familia member Eddie Vargas gave permission for Eli Rosas to be killed.

(41) During the late evening of June 26, 1991, Raul Reveles and Timothy Hernandez stabbed Eli Rosas to death outside a San Jose apartment building.

(42) On or about July 9, 1991, Eddie Vargas wrote to Joseph Hernandez at Pelican Bay State Prison asking about the status of Louie Chavez within the Nuestra Familia and suggesting that it might be appropriate for Chavez to be killed.

(43) In July, 1991, Jerry Salazar, acting on orders from Bobby Lopez, issued firearms to Herminio Serna.

(44) On July 28, 1991, Herminio Serna and his cousin, Martin Serna, killed Marcos Baca at the Santee Elementary School in San Jose. Baca was shot in the head.

(45) During the summer of 1991, Bobby Lopez investigated allegations that Louie Chavez was not properly attending to Nuestra Familia business.

(46) In late July or early August of 1991, Bobby Lopez ordered Louie Chavez to give the gang's Chevrolet Monte Carlo to Herminio Serna.

(47) In July or August of 1991, Bobby Lopez told Louie Chavez that his status within the Nuestra Familia would be "on freeze" until Chavez "brought a body" to the gang.

(48) In July or August of 1991, Bobby Lopez told Louie Chavez that the Nuestra Familia wanted him (Chavez) to kill Robert Jasso.

(49) During the summer of 1991, Bobby Lopez and Sheldon Villanueva

discussed the status of Ray Perez within the gang -- specifically whether Perez was acting as an informant. At the time both Lopez and Villanueva were inmates at the Santa Clara County Jail.

(50) During the summer of 1991, Bobby Lopez showed Eddie Vargas (both were inmates at the Santa Clara County Jail) a letter authored by Sheila Apodaca in which she threatened to expose Lopez for his involvement in a past murder or murders unless he treated her in a manner which she thought was appropriate.

(51) During the summer of 1991, Eddie Vargas (while an inmate at the Santa Clara County Jail) authored a note in which he proposed that Sheila Apodaca be "put in check" for her threats to Bobby Lopez' security.

(52) On or about August 9, 1991, Bobby Lopez (while an inmate at the Santa Clara County Jail) wrote a letter to Joseph Hernandez at Pelican Bay State Prison in which he stated that he understood Hernandez' message to him and would therefore no longer consider Louie Chavez a trusted member of the Nuestra Familia.

(53) On or about August 14, 1991, Bobby Lopez (while an inmate at the Santa Clara County Jail) wrote a letter to Joseph Hernandez at Pelican Bay State Prison in which he reported that he had informed Eddie Vargas about Hernandez' message concerning the status of Louie Chavez within the Nuestra Familia.

(54) On August 1, 1991, Celeste Williams wrote to Bobby Lopez suggesting that Sheila Apodaca be "put in check" because Apodaca was "involving you in two recent homicide[s] on two very well-known vatos." At the time Williams, Apodaca and Lopez were inmates at the Santa Clara County Jail.

(55) On August 22, 1991, Bobby Lopez wrote to Celeste Williams acknowledging receipt of Williams' letter dated August 1, 1991, and expressing appreciation for her "most welcomed and vital message."

(56) On August 27, 1991, Ronald Shelton, Jerry Salazar, Carlos Mendoza, and Anthony Guzman met at the Santa Clara residence of Guzman and Irene Nieto.

(57) On August 26, 1991, and/or August 27, 1991, Irene Nieto and Carmen Trinidad talked with Sheila Apodaca by telephone about Apodaca's desire to obtain

clothing which others had stored since her arrest and her desire to obtain new clothing which she believed Bobby Lopez and his associates would provide.

(58) On or about August 27, 1991, Irene Nieto and Jason Vasquez (then an inmate at the Santa Clara County Jail) talked by telephone. Nieto told Vasquez that Apodaca had been released from jail and also told him of Apodaca's whereabouts.

(59) On or about August 27, 1991, Jason Vasquez told Bobby Lopez (both were inmates at the Santa Clara County Jail) that Irene Nieto had told him that Sheila Apodaca had been released from jail.

(60) On or about August 27, 1991, Bobby Lopez told Jason Vasquez (both were inmates at the Santa Clara County Jail) that Ronald Shelton had been arrested and therefore Vasquez should contact Jerry Salazar and tell him to proceed with "taking care of" those matters concerning Sheila Apodaca and Ray Perez.

(61) On or about August 27, 1991, Jason Vasquez talked by telephone with Jerry Salazar and told him to take care of the matters pertaining to Sheila Apodaca and Ray Perez. Salazar told Vasquez that he already had orders from Ronald Shelton concerning both persons.

(62) On or about August 27, 1991, after talking with Jerry Salazar about Sheila Apodaca and Ray Perez, Jason Vasquez conveyed the substance of Salazar's comments to Bobby Lopez. Lopez responded by saying that he and Ronald Shelton were "on the same wavelength."

(63) On or about August 27, 1991, Herminio Serna obtained a handgun from a person at the Foxdale Apartments in San Jose.

(64) On the morning of August 28, 1991, Herminio Serna, Martin Serna and Jerry Salazar left the Oasis Motel in San Jose in an old, light-blue pickup truck.

(65) On the morning of August 28, 1991, James Trujeque left his San Jose residence in order to meet with Jerry Salazar and Herminio Serna.

(66) In the late morning of August 28, 1991, James Trujeque drove an old, light-blue pickup truck to Rocky Mountain Drive in San Jose. Carlos Mendoza was a passenger in the truck.

(67) On August 28, 1991, Carlos Mendoza, from close range, shot Sheila Apodaca in the back of the head in front of a home on Rocky Mountain Drive in San Jose.

(68) On August 28, 1991, Bobby Lopez told Jason Vasquez to tell Alice Lomelin to convey the following message to the female inmates housed at the Santa Clara County Jail: Watch the news on television tonight.

(69) On August 28, 1991, after learning that Sheila Apodaca had not yet died, Bobby Lopez complained that "that fucking Gusano" had botched the hit. ("Gusano" is the nickname of Carlos Mendoza.) Lopez also expressed fear that if Apodaca lived, she would testify.

(70) On August 28, 1991, after learning that Sheila Apodaca had not yet died, Bobby Lopez attempted to discover the name of the hospital to which she had been taken.

(71) On the morning of August 29, 1991, Carmen Trinidad visited Ronald Shelton at the Santa Clara County Jail.

(72) During the evening of August 29, 1991, Carlos Mendoza drove Mendoza's Chevrolet Blazer.

(73) On August 29, 1991, Carlos Mendoza and Jerry Salazar killed Ray Perez on Moreno Avenue in San Jose. Perez was shot several times with two separate firearms.

(74) Soon after Ray Perez was killed, Sheldon Villanueva told Robert Rios that "the mob killed Chocolate" and that "Silent" would provide him with details. At the time both were inmates at the Santa Clara County Jail.

(75) After Ray Perez was killed, Bobby Lopez authored a note reporting that Perez had been killed because he did not fulfill his duties to the Nuestra Familia and because his status within the gang was unclear.

(76) On or about August 30, 1991, after learning that both Sheila Apodaca and Ray Perez were dead, Bobby Lopez told Leonel Cano, Ray Perez' cousin, that now "Chocolate was fucking Sheila in Hell." ("Chocolate" was the nickname of Ray Perez.)

(77) On or about September 1, 1991, Eddie Vargas wrote a coded letter to Vincent Arroyo at Pelican Bay State Prison to report that, since he was finding it difficult to farm the job out, he was going to have to kill Louie Chavez himself.

(78) On or about September 2, 1991, Bobby Lopez wrote a coded letter to Vincent Arroyo at Pelican Bay State Prison in which he reported that both Sheila Apodaca and Ray Perez were now "peddling daisies."

(79) On or about September 12, 1991, Bobby Lopez wrote a coded letter to Vincent Arroyo at Pelican Bay State Prison to report that he was in contact with Santos Burnias, a possible Nuestra Familia member.

(80) On or about September 22, 1991, Jerry Salazar and Santos Burnias drove to "JP's" bar in San Jose where they observed Robert Jasso acting as a bouncer in the bar's entrance.

(81) On or about September 22, 1991, Bobby Lopez told Robert Rios (both were inmates at the Santa Clara County Jail) to tell Santos Burnias to proceed with the plans to kill Robert Jasso. Rios relayed the information to Burnias by telephone.

(82) On or about September 22, 1991, Santos Burnias shot Robert Jasso in the head at the entrance to "JP's" bar in San Jose. Jasso survived.

(83) On or about September 22, 1991, not realizing that Robert Jasso had survived, Santos Burnias relayed a message to Bobby Lopez that "the Fat Cow was out to pasture." ("Fat Cow" was the gang's derisive nickname for Jasso.)

(84) On or about September 26, 1991, after learning that Robert Jasso had survived several bullets to the head, Bobby Lopez, while housed in the Santa Clara County Jail, told another inmate housed with Leonel Cano that "they blew the hit; tell Leo there's a green light on Beto." ("Beto" is the nickname of Robert Jasso.)

(85) During the late summer or fall of 1991, Sheldon Villanueva (while housed in the Santa Clara County Jail) authored a note detailing directions to the residence of Louie Chavez. The note was given to Lopez.

(86) On October 4, 1991, Louie Chavez' mother received a telephone call from an anonymous male who asked for Chavez. Told that Chavez was not at the

residence, the caller said, "Well, never mind, your son's a dead man." At about the same time Jerry Salazar was seen parked around the corner from the residence in an automobile without license plates.

(87) On or about October 31, 1991, Vincent Arroyo (in custody at Pelican Bay State Prison) wrote a coded letter to Bobby Lopez and mentioned that Santos Burnias had described Lopez' recent gang activities. Arroyo reported that he was pleased.

(88) In the fall of 1991, Bobby Lopez and other gang members, while in custody on the fourth floor of the Santa Clara County Jail, "popped" windows in several cells and imported drugs and hacksaw blades into the jail by means of a dropline extended to affiliates outside.

(89) During November, 1991, while an inmate in the Santa Clara County Jail, Bobby Lopez attempted to escape through the window of his cell, saying that he wanted to kill witnesses whom he believed had appeared before the Grand Jury investigating Nuestra Familia activities.

(90) In late 1991, Lopez sent a letter to his then girlfriend, Michelle Crader, asking her to copy a letter in her own handwriting and direct it to Vincent Arroyo at Pelican Bay State Prison. In the letter that Crader was to copy, Lopez referred to "Bad Boy" and "a good attempt." ("Bad Boy" is the nickname of Santos Burnias.)

(91) On or about December 10, 1991, James Trujeque, knowing that he remained married to Roseann Rodriguez, married Irene Trujeque in an effort to allow her to claim a spousal privilege and thereby avoid testifying before the Grand Jury investigating the activities of the Nuestra Familia.

(92) In early 1992, Ronald Shelton and Bobby Lopez investigated Eddie Vargas for his apparent use of gang monies for purely personal purposes in violation of Nuestra Familia rules.

(93) In late March or early April of 1992, in the visiting room of the Santa Clara County Jail, Bobby Lopez showed Jason Vasquez a coded note which directed that Eddie Vargas be killed.

(94) In late March of 1992, Anthony Guzman warned Maribel Reyes "to be

careful," that "she could end up like the rest." Guzman delivered this message several hours after Reyes had talked with San Jose Police Department detectives.

(95) On or about May 5, 1992, while both were housed in the Santa Clara County Jail, Leonel Cano told Jason Vasquez that after Indictments were returned by the Grand Jury, witnesses would be listed by the gang in order of priority and then each would be killed starting "from the top down."

(96) On May 10, 1992, Bobby Lopez was captured by police in Fresno, California, after a high-speed car chase during which Lopez knocked another vehicle off a freeway overpass. Lopez was subdued only after physically assaulting the arresting officer. In the vehicle driven by Lopez was Northern Structure member Jerry Salazar.

Each of the listed Overt Acts was committed in Santa Clara County, California, except as may be noted in the description of the specific Overt Act alleged.

COUNT 2

The Grand Jury of the County of Santa Clara, State of California, hereby accuses

JOSEPH HERNANDEZ,
BOBBY LOPEZ,
JAMES TRUJEQUE and
RONALD SHELTON

of a felony, to wit, a violation of CALIFORNIA PENAL CODE SECTION 187 (MURDER), in that on or about November 20, 1990, in the County of Santa Clara, State of California, the said defendants did unlawfully and with malice aforethought, kill TONY HERRERA, a human being.

SPECIAL ALLEGATION - USE OF FIREARM

It is further alleged that at the time of and in the commission and attempted commission of the foregoing offense, the said defendants,

BOBBY LOPEZ, and
RONALD SHELTON,

each personally used a firearm, to wit, a handgun, within the meaning of sections 12022.5(a) and 1203.06 of the Penal Code.

FIRST SPECIAL CIRCUMSTANCE - MURDER BY LYING IN WAIT
(Penal Code section 190.2(a)(15))

It is further alleged that the defendants,
JOSEPH HERNANDEZ,
BOBBY LOPEZ, and
RONALD SHELTON,
JAMES TRUJEQUE

intentionally killed TONY HERRERA while lying in wait.

COUNT 3

The Grand Jury of the County of Santa Clara, State of California, hereby accuses

VINCENT ARROYO,
JOSEPH HERNANDEZ,
BOBBY LOPEZ, and
RONALD SHELTON,

of a felony, to wit, a violation of CALIFORNIA PENAL CODE SECTION 211 (ROBBERY), in that on or about November 20, 1990, in the County of Santa Clara, State of California, the said defendants did take personal property, to wit, currency and a pager, in the possession of TONY HERRERA, from his person and immediate presence and against his will by means of force and fear.

COUNT 4

The Grand Jury of the County of Santa Clara, State of California, hereby accuses

BOBBY LOPEZ

of a felony, to wit, a violation of CALIFORNIA PENAL CODE SECTION 12021 (POSSESSION OF A FIREARM BY A SPECIFIED PERSON), in that on or about November 20, 1990, in the County of Santa Clara, State of California, the said defendant, having been convicted of a felony, to wit,

Furnishing PCP to a Minor (in violation of Health and Safety Code section 11380.5),

Sale of PCP (in violation of Health and Safety Code section 11379.5) and

Possession of Cocaine (in violation of Health and Safety Code section 11350(a),

did have in his possession and under his custody and control a firearm, to wit, a handgun.

COUNT 5

The Grand Jury of the County of Santa Clara, State of California, hereby accuses

RONALD SHELTON

of a felony, to wit, a violation of CALIFORNIA PENAL CODE SECTION 12021 (POSSESSION OF A FIREARM BY A SPECIFIED PERSON), in that on or about November 20, 1990, in the County of Santa Clara, State of California, the said defendant, having been convicted of a felony, to wit,

Assault with a Deadly Weapon (in violation of Penal Code section 245(a)(1)),

Possession of Deadly Weapon by Prison Inmate (in violation of Penal Code section 4502) and

Auto Theft (in violation of Vehicle Code section 10851),

did have in his possession and under his custody and control a firearm, to wit, a handgun.

COUNT 6

The Grand Jury of the County of Santa Clara, State of California, hereby accuses

BOBBY LOPEZ

of a felony, to wit, a violation of CALIFORNIA PENAL CODE SECTION 451(d) (ARSON OF PROPERTY) in that on or about November 22, 1990, in the County of Santa Clara, State of California, the said defendant did willfully and maliciously set fire to and burn and cause to be burned and did aid, counsel, and procure the burning of property, to wit, a Chevrolet automobile, which was not the personal property of said defendant.

COUNT 7

The Grand Jury of the County of Santa Clara, State of California, hereby accuses

ANTHONY GUZMAN,
JOSEPH HERNANDEZ,
BOBBY LOPEZ, and
RONALD SHELTON,

of a felony, to wit, a violation of CALIFORNIA PENAL CODE SECTION 187 (MURDER), in that on or about April 15, 1991, in the County of Santa Clara, State of California, the said defendants did unlawfully and with malice aforethought, kill LARRY VALLES, a human being.

SPECIAL ALLEGATION - USE OF FIREARM

It is further alleged that at the time of and in the commission and attempted commission of the foregoing offense, the said defendants,

BOBBY LOPEZ and
RONALD SHELTON,

each personally used a firearm, to wit, a handgun, within the meaning of sections 12022.5(a) and 1203.06 of the Penal Code.

COUNT 8

The Grand Jury of the County of Santa Clara, State of California, hereby accuses

ANTHONY GUZMAN,
JOSEPH HERNANDEZ,
BOBBY LOPEZ, and
RONALD SHELTON,

of a felony, to wit, a violation of CALIFORNIA PENAL CODE SECTION 524 (ATTEMPTED EXTORTION), in that on or about April 15, 1991, in the County of Santa Clara, State of California, the said defendants did attempt to extort money and other property from a person, to wit, LARRY VALLES, by a threat, to wit, to do an unlawful injury to said person and property of said person and of a third person.

COUNT 9

The Grand Jury of the County of Santa Clara, State of California, hereby accuses

BOBBY LOPEZ

of a felony, to wit, a violation of CALIFORNIA PENAL CODE SECTION 12021 (POSSESSION OF A FIREARM BY A SPECIFIED PERSON), in that on or about April 15, 1990, in the County of Santa Clara, State of California, the said defendant, having been convicted of a felony, to wit,

Furnishing PCP to a Minor (in violation of Health and Safety Code section 11380.5),

Sale of PCP (in violation of Health and Safety Code section 11379.5) and

Possession of Cocaine (in violation of Health and Safety Code section 11350(a),

did have in his possession and under his custody and control a firearm, to wit, a handgun.

COUNT 10

The Grand Jury of the County of Santa Clara, State of California, hereby accuses

RONALD SHELTON

of a felony, to wit, a violation of CALIFORNIA PENAL CODE SECTION 12021 (POSSESSION OF A FIREARM BY A SPECIFIED PERSON), in that on or about April 15, 1991, in the County of Santa Clara, State of California, the said defendant, having been convicted of a felony, to wit,

Assault with a Deadly Weapon (in violation of Penal Code section 245(a)(1)),
Possession of Deadly Weapon by Prison Inmate (in violation of Penal Code section 4502) and
Auto Theft (in violation of Vehicle Code section 10851),

did have in his possession and under his custody and control a firearm, to wit, a handgun.

COUNT 11

The Grand Jury of the County of Santa Clara, State of California, hereby accuses

LEONEL CANO,
JOSEPH HERNANDEZ,
BOBBY LOPEZ,
RONALD SHELTON, and
SHELDON VILLANUEVA

of a felony, to wit, a violation of CALIFORNIA PENAL CODE SECTION 664/187 (WILLFUL, DELIBERATE AND PREMEDITATED ATTEMPTED MURDER) in that on or about May 23, 1991, in the County of Santa Clara, State of California, the said defendants did attempt to willfully, deliberately, and with premeditation murder a human being, to wit, GABRIEL CORONADO, in violation of Penal Code Sections 187.

COUNT 12

The Grand Jury of the County of Santa Clara, State of California, hereby accuses

JOSEPH HERNANDEZ,
TIMOTHY HERNANDEZ,

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BOBBY LOPEZ,
RAUL REVELES,
JERRY SALAZAR,
RONALD SHELTON, and
EDDIE VARGAS

of a felony, to wit, a violation of CALIFORNIA PENAL CODE SECTION 187 (MURDER), in that on or about June 26, 1991, in the County of Santa Clara, State of California, the said defendants did unlawfully and with malice aforethought, kill ELIAS ROSAS, a human being.

SPECIAL ALLEGATION -- USE OF DEADLY WEAPON (NOT A FIREARM)

It is further alleged that at the time of and in the commission and attempted commission of the foregoing offense, the said defendants,

TIMOTHY HERNANDEZ and
RAUL REVELES,

each personally used a deadly and dangerous weapon, to wit, a sharp instrument, within the meaning of section 12022(b) of the Penal Code.

COUNT 13

The Grand Jury of the County of Santa Clara, State of California, hereby accuses

JOSEPH HERNANDEZ,
BOBBY LOPEZ,
JERRY SALAZAR,
HERMINIO SERNA,
MARTIN SERNA, and
RONALD SHELTON,

of a felony, to wit, a violation of CALIFORNIA PENAL CODE SECTION 187 (MURDER), in that on or about July 28, 1991, in the County of Santa Clara, State of

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California, the said defendants did unlawfully and with malice aforethought, kill MARCOS BACA, a human being.

SPECIAL ALLEGATION - USE OF FIREARM

It is further alleged that at the time of and in the commission and attempted commission of the foregoing offense, the said defendant,

HERMINIO SERNA,

personally used a firearm, to wit, a handgun, within the meaning of sections 12022.5(a) and 1203.06 of the Penal Code.

COUNT 14

The Grand Jury of the County of Santa Clara, State of California, hereby accuses

HERMINIO SERNA

of a felony, to wit, a violation of CALIFORNIA PENAL CODE SECTION 12021 (POSSESSION OF A FIREARM BY A SPECIFIED PERSON), in that on or about July 28, 1991, in the County of Santa Clara, State of California, the said defendant, having been convicted of a felony, to wit,

First Degree Burglary (in violation of Penal Code sections 459 and 460.1) and

Possession of PCP (in violation of Health and Safety Code section 11377(a)),

did have in his possession and under his custody and control a firearm, to wit, a handgun.

COUNT 15

The Grand Jury of the County of Santa Clara, State of California, hereby accuses

ANTHONY GUZMAN,
JOSEPH HERNANDEZ,
BOBBY LOPEZ,
IRENE NIETO,

JERRY SALAZAR,
HERMINIO SERNA,
RONALD SHELTON,
CARMEN TRINIDAD, and
JAMES TRUJEQUE,

of a felony, to wit, a violation of CALIFORNIA PENAL CODE SECTION 187 (MURDER), in that on or about August 28, 1991, in the County of Santa Clara, State of California, the said defendants did unlawfully and with malice aforethought, kill SHEILA APODACA, a human being.

SECOND SPECIAL CIRCUMSTANCE - MURDER OF A WITNESS
(Penal Code section 190.2(a)(10))

It is further alleged that SHEILA APODACA was a witness to a crime who was intentionally killed by the defendants,

ANTHONY GUZMAN,
JOSEPH HERNANDEZ,
BOBBY LOPEZ,
IRENE NIETO,
JERRY SALAZAR,
HERMINIO SERNA,
RONALD SHELTON,
CARMEN TRINIDAD, and
JAMES TRUJEQUE,

for the purpose of preventing her testimony in a criminal proceeding and the killing was not committed during the commission and attempted commission of the crime to which she was a witness.

COUNT 16

The Grand Jury of the County of Santa Clara, State of California, hereby accuses

ANTHONY GUZMAN,
JOSEPH HERNANDEZ,
BOBBY LOPEZ,
CARLOS MENDOZA,
JERRY SALAZAR, and
RONALD SHELTON,

of a felony, to wit, a violation of CALIFORNIA PENAL CODE SECTION 187 (MURDER), in that on or about August 29, 1991, in the County of Santa Clara, State of California, the said defendants did unlawfully and with malice aforethought, kill RAY PEREZ, a human being.

SPECIAL ALLEGATION - USE OF FIREARM

It is further alleged that at the time of and in the commission and attempted commission of the foregoing offense, the said defendants,

CARLOS MENDOZA and
JERRY SALAZAR,

each personally used a firearm, to wit, a handgun, within the meaning of sections 12022.5(a) and 1203.06 of the Penal Code.

COUNT 17

The Grand Jury of the County of Santa Clara, State of California, hereby accuses

CARLOS MENDOZA

of a felony, to wit, a violation of CALIFORNIA PENAL CODE SECTION 12021 (POSSESSION OF A FIREARM BY A SPECIFIED PERSON), in that on or about August 29, 1991, in the County of Santa Clara, State of California, the said defendant,

having been convicted of a felony, to wit,

Possession of PCP for Sale (in violation of Health and Safety Code section 11378.5),

Receiving Stolen Property (in violation of Penal Code section 496),

Possession of PCP (in violation of Health and Safety Code section 11377(a),

Possession of Cocaine (in violation of Health and Safety Code section 11350(a),

Possession of Methamphetamine (in violation of Health and Safety Code section 11377(a) and

Driving Under the Influence with Three or More Priors (in violation of Vehicle Code sections 23152(b) and 23175),

did have in his possession and under his custody and control a firearm, to wit, a handgun.

COUNT 18

The Grand Jury of the County of Santa Clara, State of California, hereby accuses

JERRY SALAZAR

of a felony, to wit, a violation of CALIFORNIA PENAL CODE SECTION 12021 (POSSESSION OF A FIREARM BY A SPECIFIED PERSON), in that on or about August 29, 1991, in the County of Santa Clara, State of California, the said defendant, having been convicted of a felony, to wit,

Sale of PCP (in violation of Health and Safety Code section 11379) and

Sale of PCP (in violation of Health and Safety Code section 11379),

did have in his possession and under his custody and control a firearm, to wit, a handgun.

COUNT 19

The Grand Jury of the County of Santa Clara, State of California, hereby accuses

SANTOS BURNIAS,

JOSEPH HERNANDEZ,
BOBBY LOPEZ,
JERRY SALAZAR, and
RONALD SHELTON

of a felony, to wit, a violation of CALIFORNIA PENAL CODE SECTION 664/187 (WILLFUL, DELIBERATE AND PREMEDITATED ATTEMPTED MURDER) in that on or about September 22, 1991, in the County of Santa Clara, State of California, the said defendants did attempt to willfully, deliberately, and with premeditation murder a human being, to wit, ROBERT JASSO, in violation of Penal Code Sections 187.

SPECIAL ALLEGATION - USE OF FIREARM

It is further alleged that at the time of and in the commission and attempted commission of the foregoing offense, the said defendant,

SANTOS BURNIAS,

personally used a firearm, to wit, a handgun, within the meaning of sections 12022.5(a) and 1203.06 of the Penal Code.

COUNT 20

The Grand Jury of the County of Santa Clara, State of California, hereby accuses

HERMINIO SERNA

of a felony, to wit, a violation of CALIFORNIA PENAL CODE SECTION 187 (MURDER), in that on or about July 24, 1991, in the County of Santa Clara, State of California, the said defendant did unlawfully and with malice aforethought, kill ESTEBAN RAMIREZ GUZMAN, a human being.

SPECIAL ALLEGATION - USE OF FIREARM

It is further alleged that at the time of and in the commission and attempted commission of the foregoing offense, the said defendant,

HERMINIO SERNA,

personally used a firearm, to wit, a handgun, within the meaning of sections 12022.5(a) and 1203.06 of the Penal Code.

COUNT 21

The Grand Jury of the County of Santa Clara, State of California, hereby accuses

HERMINIO SERNA

of a felony, to wit, a violation of CALIFORNIA PENAL CODE SECTION 12021 (POSSESSION OF A FIREARM BY A SPECIFIED PERSON), in that on or about July 24, 1991, in the County of Santa Clara, State of California, the said defendant, having been convicted of a felony, to wit,

First Degree Burglary (in violation of Penal Code sections 459 and 460.1) and

Possession of PCP (in violation of Health and Safety Code section 11377(a)),

did have in his possession and under his custody and control a firearm, to wit, a shotgun.

SPECIAL ALLEGATION -- GANG PARTICIPATION IN OFFENSES

It is further alleged that the defendants, to wit,

VINCENT ARROYO,
ANDREW CERVANTES,
ANTHONY GUZMAN,
JOSEPH HERNANDEZ,
TIMOTHY HERNANDEZ,
ALICE PEREZ LOMELIN,
BOBBY LOPEZ,
CARLOS MENDOZA,
IRENE NIETO,
RAUL REVELES,

JERRY SALAZAR,
HERMINIO SERNA,
MARTIN SERNA,
RONALD SHELTON,
CARMEN TRINIDAD,
JAMES TRUJEQUE, and
EDDIE VARGAS,

committed those offenses alleged in Counts 1 through 21, inclusive, for the benefit of, at the direction of, and in association with a criminal street gang, with the specific intent to promote, further, and assist in criminal conduct by gang members, within the meaning of section 186.22(b)(1) of the Penal Code.

THIRD SPECIAL CIRCUMSTANCE - PRIOR MURDER CONVICTION
(Penal Code section 190.2(a)(2))

It is further alleged that the defendant,
JOSEPH HERNANDEZ,
was previously convicted of murder in the Superior Court of the State of California, in and for the County of Los Angeles.

FOURTH SPECIAL CIRCUMSTANCE - PRIOR MURDER CONVICTION
(Penal Code section 190.2(a)(2))

It is further alleged that the defendant,
JAMES TRUJEQUE,
was previously convicted of murder in the Superior Court of the State of California, in and for the County of Fresno.

FIFTH SPECIAL CIRCUMSTANCE - MULTIPLE MURDER
(Penal Code section 190.2(a)(3)

It is further alleged that the defendants,

ANTHONY GUZMAN,
JOSEPH HERNANDEZ,
BOBBY LOPEZ,
JERRY SALAZAR,
HERMINIO SERNA, and
RONALD SHELTON

have in this proceeding been convicted of more than one offense of murder in the first and second degree.

PRIOR PRISON TERMS AND CONVICTIONS

BOBBY LOPEZ

It is further alleged that prior to the commission of each of the offenses charged herein, the said defendant BOBBY LOPEZ was, in the Superior Court of the State of California, in and for the County of SANTA CLARA (#111040), convicted of a felony, to wit: SALE OF PCP, in violation of section 11379.5 of the Health and Safety Code of the State of California, and served a prison term therefor, which prison term was separate from any other prison term alleged herein, and subsequent to said prison term the said defendant has not remained free of both prison custody and the commission of an offense resulting in a felony conviction for a period of five years, within the meaning of section 667.5(b) of the Penal Code.

It is further alleged that prior to the commission of the offenses charged herein, the said defendant, BOBBY LOPEZ, was, in the Superior Court of the State of California, in and for the County of SANTA CLARA (#98913), convicted of a serious felony, to wit: FURNISHING PCP TO A MINOR (Health and Safety Code section 11380.5), on charges brought and tried separately, within the meaning of sections 667 and 1192.7 of the Penal Code.

CARLOS MENDOZA

It is further alleged that prior to the commission of each of the offenses charged herein, the said defendant CARLOS MENDOZA was, in the Superior Court of the State of California, in and for the County of SANTA CLARA (#112479), convicted of a felony, to wit: POSSESSION OF PCP FOR SALE, in violation of section 11378.5 of the Health and Safety Code of the State of California, and served a prison term therefor, which prison term was separate from any other prison term alleged herein, and subsequent to said prison term the said defendant has not remained free of both prison custody and the commission of an offense resulting in a felony conviction for a period of five years, within the meaning of section 667.5(b) of the Penal Code.

It is further alleged that prior to the commission of each of the offenses charged herein, the said defendant CARLOS MENDOZA was, in the Superior Court of the State of California, in and for the County of SANTA CLARA (#13167), convicted of a felony, to wit: POSSESSION OF METHAMPHETAMINE, in violation of section 11377(a) of the Health and Safety Code of the State of California, and served a prison term therefor, which prison term was separate from any other prison term alleged herein, and subsequent to said prison term the said defendant has not remained free of both prison custody and the commission of an offense resulting in a felony conviction for a period of five years, within the meaning of section 667.5(b) of the Penal Code.

HERMINIO SERNA

It is further alleged that prior to the commission of each of the offenses charged herein, the said defendant HERMINIO SERNA was, in the Superior Court of the State of California, in and for the County of SANTA CLARA (#111759), convicted of a felony, to wit: POSSESSION OF PCP, in violation of section 11377(a) of the Health and Safety Code of the State of California, and served a prison term therefor, which prison term was separate from any other prison term alleged herein, and subsequent to said prison term the said defendant has not remained free of both prison custody and the commission of an offense resulting in a felony conviction for a period of five years,

within the meaning of section 667.5(b) of the Penal Code.

It is further alleged that prior to the commission of the offenses charged herein, the said defendant, HERMINIO SERNA, was, in the Superior Court of the State of California, in and for the County of ALAMEDA (#H9379), convicted of a serious felony, to wit: FIRST DEGREE BURGLARY (Penal Code section 459), on charges brought and tried separately, within the meaning of sections 667 and 1192.7 of the Penal Code.

It is further alleged that prior to the commission of the offenses charged herein, the said defendant, HERMINIO SERNA, was, in the Superior Court of the State of California, in and for the County of SANTA CLARA (#116815), convicted of a serious felony, to wit: FIRST DEGREE BURGLARY (Penal Code section 459), on charges brought and tried separately, within the meaning of sections 667 and 1192.7 of the Penal Code.

JAMES TRUJEQUE

It is further alleged that prior to the commission of each of the offenses charged herein, the said defendant JAMES TRUJEQUE was, in the Superior Court of the State of California, in and for the County of SANTA CLARA (#143846), convicted of a felony, to wit: PETTY THEFT WITH A PRIOR, in violation of section 666 of the Penal Code of the State of California, and served a prison term therefor, which prison term was separate from any other prison term alleged herein, and subsequent to said prison term the said defendant has not remained free of both prison custody and the commission of an offense resulting in a felony conviction for a period of five years, within the meaning of section 667.5(b) of the Penal Code.

It is further alleged that prior to the commission of each of the offenses charged herein, the said defendant JAMES TRUJEQUE was, in the Superior Court of the State of California, in and for the County of FRESNO (#217663), convicted of a felony, to wit: ASSAULT WITH INTENT TO COMMIT MURDER, in violation of section 217 of the Penal Code of the State of California, and served a prison term therefor, which prison term was separate from any other prison term alleged herein, and subsequent to said

prison term the said defendant has not remained free of both prison custody and the commission of an offense resulting in a felony conviction for a period of five years, within the meaning of section 667.5(b) of the Penal Code.

It is further alleged that prior to the commission of the offenses charged herein, the said defendant, JAMES TRUJEQUE, was, in the Superior Court of the State of California, in and for the County of SANTA CLARA (#59933), convicted of a serious felony, to wit: SECOND DEGREE BURGLARY (Penal Code section 459), on charges brought and tried separately, within the meaning of sections 667 and 1192.7 of the Penal Code.

It is further alleged that prior to the commission of the offenses charged herein, the said defendant, JAMES TRUJEQUE, was, in the Superior Court of the State of California, in and for the County of FRESNO (#217663), convicted of a serious felony, to wit: SECOND DEGREE MURDER (Penal Code section 187), on charges brought and tried separately, within the meaning of sections 667 and 1192.7 of the Penal Code.

EDDIE VARGAS

It is further alleged that prior to the commission of each of the offenses charged herein, the said defendant EDDIE VARGAS was, in the Superior Court of the State of California, in and for the County of SANTA CLARA (#86086), convicted of a felony, to wit: ROBBERY, in violation of section 211 of the Penal Code of the State of California, and served a prison term therefor, which prison term was separate from any other prison term alleged herein, and subsequent to said prison term the said defendant has not remained free of both prison custody and the commission of an offense resulting in a felony conviction for a period of five years, within the meaning of section 667.5(b) of the Penal Code.

It is further alleged that prior to the commission of each of the offenses charged herein, the said defendant EDDIE VARGAS was, in the Superior Court of the State of California, in and for the County of SANTA CLARA (#99870), convicted of a felony, to wit: ROBBERY, in violation of section 211 of the Penal Code of the State of California,

and served a prison term therefor, which prison term was separate from any other prison term alleged herein, and subsequent to said prison term the said defendant has not remained free of both prison custody and the commission of an offense resulting in a felony conviction for a period of five years, within the meaning of section 667.5(b) of the Penal Code.

It is further alleged that prior to the commission of the offenses charged herein, the said defendant, EDDIE VARGAS, was, in the Superior Court of the State of California, in and for the County of SANTA CLARA (#86086), convicted of a serious felony, to wit: ROBBERY (Penal Code section 211), on charges brought and tried separately, within the meaning of sections 667 and 1192.7 of the Penal Code.

It is further alleged that prior to the commission of the offenses charged herein, the said defendant, EDDIE VARGAS, was, in the Superior Court of the State of California, in and for the County of SANTA CLARA (#99870), convicted of a serious felony, to wit: ROBBERY (Penal Code section 211), on charges brought and tried separately, within the meaning of sections 667 and 1192.7 of the Penal Code.

GEORGE KENNEDY
DISTRICT ATTORNEY

CHARLES CONSTANTINIDES
Deputy District Attorney

CATHERINE CONSTANTINIDES
Deputy District Attorney

"A TRUE BILL"

ROBERT J. FINOCCHIO
FOREPERSON OF THE GRAND JURY
DATE:

WITNESSES TESTIFYING BEFORE GRAND JURY

Allen, Parole Officer E.J.
Andrade, Jessie
Antonio, Leslie Jean
Antuna, Gloria Norma
Ayala, Tina
Benavidez, Gloria
Benjamin, Leroy
Binz, CO Curtis
Bonilla, Tina
Britt, Donald
Caudillo, Stephanie
Cervantes, Darlene
Chavez, Louie
Contreras, Marissa
Coronado, Gabriel
Crader, Michelle
Cuascat, Deborah
Cuevas, Elizabeth
Davilla, Frank
Dominguez Officer
Dotzler, Sgt. Jennifer
Downing, Officer Rodolfo
Duscio, CO Janet
Fairhurst, Sgt. Richard
Falin, Ronald
Farfan, Yvonne
Flores, Jodie Gayleene
Gabrielson, CO Christian
Gonzales Officer William
Gossett, Yvonne
Gray, CO Carlton
Guerrero, Rudy
Guillen, Yvette
Hall, Officer Rowdy
Hawkes, Sgt. Devan
Hernandez, Andrea
Hernandez, Marlene Torrez
Hernandez, Sonia
Holmes, Robert (LPE)
Langley, Deputy David
Lara, Bob
Ligouri, Officer Mark
Lomelin, Alice
Lopez, Roseann
Lord, James
Loyola, Flora
Loyola, Sonia
Maciel, Steve
Marquez, Joseph
Martinez, Evangeline
Mejias, Carlos
Melton, Walther
Mendoza, Stella
Montoya, Ray

001402

Moody, Lavoy
Moore, LaDeace
Moore, Tanganyika
Nichols, Christina
Nieto, Irene
Olmos, Arthur
O'Mullen, CO John
Ornelas, Emily
O'Rourke, Martha
Ortiz, Jessica
Ortiz, Officer Leanard
Ouimet, Sgt. Jeff
Ozoa, Angelo M.D.
Pakdaman, Parviz M.D.
Parker, Teresa
Petersen, Ed
Ponce, Christine
Pringle, Officer Carl
Ramirez, Lisa
Ramirez, Monique
Ramirez, Tina
Ramirez, Yvonne Marie
Ray, Deputy Donald
Reyes, David
Reyes, Gilbert
Reyes, Maribel
Reynoso, Elvia
Rios, Felipa
Rios, Robert
Roberts, Capt. Joseph
Robinson, Andrea
Robinson, Charles
Rocha, Isabel
Rodriguez, Roseann
Saldivar, Roland
Sandoval, Joe
Santiago, Eddie
Santos, Officer William
Serna, Ernestina
Shuper, Officer Kim
Smith, Officer Kurt
Smith, Nancy
Spencer, Beatrice
Sterner, Sgt. Mike
Tieng, Soksan Bun
Torrez, Ray
Trinidad, Carmen
Trujeque, Irene
Usoz, Sgt. Steve
Valdez, Peggy
Valenzuela, Frank
Vameghi, Massoud M.D.
Varnado, CO Don
Vasquez, Horacio Jason
Vigil, Lupe
Villa, Ricardo
Wilkes, Officer Greg
Williams, Cecille

Williams, Celeste
Zaniga, Elidia

001404

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

BEFORE THE HONORABLE KEVIN J. MURPHY, JUDGE

DEPARTMENT NO. 28

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PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF, -VS- EDWARD VARGAS, DEFENDANT.	NO. 156285

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

AUGUST 15, 1997

SENTENCING

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A P P E A R A N C E S :

FOR THE PEOPLE: OFFICE OF THE DISTRICT ATTORNEY
BY: CHARLES CONSTANTINIDES, D.D.A.
CATHERINE CONSTANTINIDES, D.D.A

FOR THE DEFENDANT EDWARD VARGAS: ALBERT MELOLING, ATTORNEY AT LAW

OFFICIAL COURT REPORTER: BEATRICE S. VALDIVIA, C.S.R.
CERTIFICATE NO. 6610

---000---

BEATRICE S. VALDIVIA, C.S.R. 6610

THINGS. YOU'VE ATTACKED THE WITNESSES, AND ALMOST AS AN AFTERTHOUGHT, YOU ATTACKED JUROR NUMBER THREE, FOR SOME UNKNOWN REASON.

THE COMPLAINTS YOU'VE HAD ABOUT YOUR LAWYER HAS BEEN CONSIDERED BY THIS COURT AT A NUMBER OF MARSDEN HEARINGS. I CANNOT COMMENT ON WHAT OCCURRED DURING THOSE HEARINGS BUT IN EACH INSTANCE I FOUND IT WAS INAPPROPRIATE TO REMOVE YOUR LAWYER. SINCE YOU TOOK THE STEP ONCE AGAIN TO ATTACK YOUR LAWYER IN OPEN COURT, REFERRING TO HIM AS A LIAR AND A DUMP TRUCK AMONG OTHER THINGS IT IS APPROPRIATE FOR ME TO SAY THAT I HAVE OBSERVED HIM FOR A PERIOD OF FIVE YEARS, AS HE HAS REPRESENTED YOU, IN MY OPINION, HE IS AN EXCEPTIONALLY COMPETENT. HE CONDUCTED THE DEFENSE AS BEST HE COULD, WORKING WITH THE EVIDENCE THAT EXISTED. HE IS A CONSUMMATE PROFESSIONAL. HE IN NO WAY, IN MY OPINION, IS A LIAR. AND I FEEL IT'S APPROPRIATE TO MAKE THOSE COMMENTS SINCE YOU ATTACKED HIM THIS TIME IN OPEN COURT.

WITH REFERENCE TO SENTENCING IN THIS CASE, AS POINTED OUT BY THE PEOPLE IN ARGUMENT, AS POINTED OUT IN THE PROBATION REPORT, AS IT RELATES TO THE TWO CONVICTIONS IN THIS CASE, ONE FOR FIRST DEGREE MURDER AND ONE FOR CONSPIRACY TO COMMIT A NUMBER OF CRIMES, INCLUDING MURDER, THE EVIDENCE DEMONSTRATES TO THE SATISFACTION OF THE JURY, AS INDICATED BY THEIR VERDICT, THAT YOU WERE INVOLVED NOT ONLY IN THE DEATH OF ELIAS ROSAS, THAT YOU WERE GUILTY OF HIS MURDER, BUT THAT YOU PARTICIPATED IN OTHER CRIMINAL ACTIVITY. MOST SIGNIFICANT TO THE SENTENCE THAT THIS COURT WILL IMPOSE, EVIDENCE WAS PRESENTED IN CONNECTION WITH THE

CONSPIRACY COUNT TO SUPPORT THE CONCLUSION THAT YOU WERE INVOLVED IN CONSPIRACIES TO MURDER ALPHONSO URANGO, JAMES ESPARZA, LOUIE CHAVEZ AND OTHERS.

THEREFORE, AS FAR AS THE COURT'S SENTENCING DECISION AS IT RELATES TO THESE TWO COUNTS, I FEEL THAT IT'S APPROPRIATE TO IMPOSE CONSECUTIVE SENTENCING.

I WOULD NOTE PRIOR TO DOING EXACTLY THAT, NUMBER ONE, THAT THESE CRIMES AND THESE OBJECTIVES WERE PREDOMINANTLY INDEPENDENT OF EACH OTHER. THAT THE CRIMES INVOLVED SEPARATE ACTS OF VIOLENCE OR THREATENED VIOLENCE, AND THAT THE CRIMES COMMITTED AT DIFFERENT TIMES OR SEPARATE PLACES, RATHER THAN BEING COMMITTED CLOSELY IN TIME AND PLACE, SO AS TO INDICATE A SINGLE PERIOD OF ABHORRENT BEHAVIOR. IN SHORT, IT IS LEGALLY APPROPRIATE, AND I FEEL IT IS APPROPRIATE AS WELL AFTER HEARING THE EVIDENCE IN THIS CASE, AND CONSIDERING ALL INFORMATION ABOUT YOU AS SET FORTH IN THE PROBATION REPORT, TO SENTENCE YOU CONSECUTIVELY AND I DO SO AS FOLLOWS:

WITH REFERENCE TO COUNT ONE, YOU ARE SENTENCED TO SERVE 25 YEARS TO LIFE IN STATE PRISON. WITH REFERENCE TO COUNT TWELVE, YOU ARE ALSO ORDERED TO SERVE 25 YEARS TO LIFE IN STATE PRISON, THE SENTENCES JUST IMPOSED ARE ORDERED TO RUN CONSECUTIVE TO EACH OTHER.

AS A RESULT OF THE PRIOR CONVICTIONS FOUND TO BE TRUE AS IT RELATES TO EACH PRIOR CONVICTION, YOU ARE ORDERED TO SERVE FIVE YEARS IN STATE PRISON, THOSE FIVE YEAR SENTENCES ARE ORDERED TO RUN CONSECUTIVE TO EACH OTHER AND THEN AGAIN CONSECUTIVE TO THE SENTENCES IMPOSED ON COUNTS

IN T. SUPERIOR COURT OF THE ST. OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

BEFORE THE HONORABLE KEVIN J. MURPHY, JUDGE

DEPARTMENT NO. 28

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PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF, -VS- EDWARD VARGAS, DEFENDANT.	NO. 156285

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

JUNE 18, 1997

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OFFICIAL COURT REPORTERS: BEATRICE S. VALDIVIA, C.S.R.
CERTIFICATE NO. 6610
JOAN E. SCHAFER, C.S.R.
CERTIFICATE NO. 6053

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BEATRICE S. VALDIVIA, C.S.R. 6610

CRIMES IN OUR CASE RANGE OBVIOUSLY FROM HERRERA TO VALLES TO ROSAS TO BACA TO GUZMAN, ALL CRIMES FOR WHICH THERE WAS A CONSPIRACY TO COMMIT.

NOW, YOU DON'T NEED TO NECESSARILY BELIEVE THAT, FOR EXAMPLE, THERE WAS A SUBJECT CRIME OF PERHAPS MR. GUZMAN, THE FELLOW ON DALE DRIVE. PERHAPS YOU WOULD FIND THAT THE TARGET CRIMES WOULD BE OTHER PEOPLE, PERHAPS THAT THERE WAS A SUBJECT CRIME OF TONY HERRERA, FOR EXAMPLE, BECAUSE EVERYBODY WAS GETTING TOGETHER TO GO AFTER TONY HERRERA.

CURIOUS ABOUT WHO MIGHT BE THE SUBJECTS OF THE TARGET CRIME OF MURDER. LOUIE CHAVEZ WAS ONE. THEY WERE GOING AFTER HIM, VARGAS IN PARTICULAR. APPARENTLY THERE WAS A GREEN LIGHT ISSUED FROM PELICAN BAY ON CHAVEZ. VARGAS INDEED GOT PERMISSION, WANTED THE CONTRACT.

RONNIE SHELTON LATER TRIED TO IMPLEMENT THAT SAME SUBJECT CRIME. THERE WERE OTHERS. THERE WAS GEORGE BOULDT, REMEMBER PONCHE. THERE WAS ALFONSO URANGO. THERE WAS BETO JASSO WHO OPENLY GETS SHOT OUTSIDE OF J.P.'S. THERE'S JOCKO ESPARZA. THAT WAS THE MAN WHO VARGAS DIDN'T LIKE BECAUSE HE WAS APPARENTLY HAVING A SEXUAL RELATIONSHIP WITH VARGAS' WIFE TAMMY.

NOW, FOR PURPOSES OF THIS TRIAL NO ONE OF THE DEFENDANTS IS GUILTY OF THE UNDERLYING TARGET CRIME UNLESS HE IS ACTIVELY INVOLVED.

NOW, THAT MIGHT SEEM A LITTLE CONFUSING, BUT CONSIDER THIS. ONE THING, AND I'LL MENTION IT LATER, BUT I'LL MENTION IT HERE TOO, LOPEZ IS NO LONGER CHARGED IN THE ROSAS AND IN THE BACA HOMICIDES. WHEN THE ORIGINAL INDICTMENT WAS

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

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PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF, -VS- EDWARD VARGAS, DEFENDANT.	NO. 156285

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

JUNE 12, 1997

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OFFICIAL COURT REPORTERS: BEATRICE S. VALDIVIA, C.S.R.
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JOAN E. SCHAFER, C.S.R.
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HAVE CONCURRENT CONVICTIONS.

THE COURT: WELL, THE SAME COULD BE SAID, AND I KNOW MR. CONSTANTINIDES IS ARGUING TO THE CONTRARY, SAME COULD BE SAID CONCERNING A.D.W.'S.

MS. CONSTANTINIDES: TRUE. I SUPPOSE THE PEOPLE DON'T HAVE AS MUCH OF AN INTEREST IN THE SENTENCING OF THOSE DETERMINATE CRIMES OR CRIMES THAT CARRY A DETERMINATE SENTENCE.

MR. PROVINI: THAT COULD ALWAYS BE SAID IN ANY CASE. AN ARGUMENT WHETHER IT'S 654 AT THE TIME OF SENTENCING IS OFTEN MADE BY DEFENSE, SOMETIMES ACCEPTED AND SOMETIMES OBJECTED TO ACCORDING TO THE FACTS. I THINK THAT CALLS FOR THIS COURSE OF SENTENCING.

MR. MELOLING: USING THE SAMPLE OF MR. VARGAS AND MS. CONSTANTINIDES REFERS TO THAT 654 PROBLEM, MR. VARGAS OBJECTS TO ANY REFERENCE TO A CONSPIRACY TO MURDER ALFONSO URANGO OR JASON VASQUEZ WHERE THERE WAS NO EVIDENCE BEFORE THE GRAND JURY WITH REFERENCE TO THOSE ALLEGATIONS NOR WAS THERE ANY SPECIAL -- WAS THERE ANY OVERT ACT ALLEGED IN THE INDICTMENT WITH REFERENCE TO THOSE. AND THE ONLY EVIDENCE WE HEARD WAS DURING THE COURSE OF THE TRIAL FROM JERRY SALAZAR AND PERHAPS ONE OTHER WITNESS. MR. VARGAS WAS NOT IN THE POSITION WHERE HE COULD PREPARE A DEFENSE WITH REFERENCE TO THOSE ALLEGATIONS SINCE THEY DIDN'T OCCUR UNTIL THE TRIAL WAS WELL IN PROGRESS. SO ANY REFERENCE TO THOSE SPECIFIC CHARGES AS OBJECT CRIMES OF THE CONSPIRACY ARE CERTAINLY UNFAIR AS TO MR. VARGAS.

THE COURT: ALL RIGHT.